Supreme Court, U.S.
FILED

02-51 MAY 30 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

WILLIAM F. LINCOLN, M.D.,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM F. LINCOLN, M.D.,
Pro se
637 Earl's Slough Ct.
Tallahassee, FL 32312
(850) 544-9700

8 9 P9

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision denying petitioner's Application for Certificate of Appealability was proper where petitioner was adjudicated incompetent and committed for psychiatric treatment, and upon release was denied the competency restoration hearing mandated by 18 USC § 4241(e) and taken straight to trial without a finding of competency in violation of U.S. Code and *Pate vs. Robinson*, 383 U.S. 375 (1966), the trial was marred by 20 disruptions and petitioner was briefly hospitalized during the trial due to mental breakdown. The trial court's jurisdiction to override 18 USC § 4241(e) and take Lincoln to trial without a hearing is at issue here, as is the due process of law.

2. Whether the Eleventh Circuit's decision denying petitioner's Application for Certificate of Appealability was proper where the record shows petitioner was subjected to a retroactive judicial statutory enlargement in conflict with this court's holdings in *Marks v. United States*, 430 U.S. 188 (1977); the Government expanded the criminal scope of conduct in the indictment and jury charge to include conduct that was not criminalized under the statute at the time of the alleged offense conduct, violating petitioner's Fifth Amendment right to be protected from retroactive judicial enlargements.

3. Whether the Eleventh Circuit's decision denying petitioner's Application for Certificate of Appealability was proper where petitioner's defense counsel failed to object to the application of an "ex post facto type" statutory enlargement to petitioner's indictment and jury charge; and where counsel failed to seek a competency restoration hearing in conformity with the gatekeeping provision of 18 U.S.C. § 4241(e), before

QUESTIONS PRESENTED – Continued

petitioner's trial, prejudicing him and denying petitioner's right to effective assistance of counsel; where on direct appeal, petitioner preserved his ineffective counsel claims, the Eleventh Circuit, in their opinion of November 17, 1998, referred petitioner to a 28 U.S.C. § 2255 action to expand the record without prejudice.

PARTIES TO THE PROCEEDING

The Parties to the Proceeding are William F. Lincoln, MD, Petitioner herein and appellant/petitioner below and the United States, Respondent herein.

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I. Lincoln Was Adjudicated Incompetent And Committed For Treatment Pursuant To 18 USC § 4241(d) Upon Release Lincoln Was Taken To Trial Without The Statutory Competency Restoration Hearing Required By 18 USC § 4241(e). This Lack Of Hearing Is Plain On The Record And The Government Has Conceded That It Was Not Held. U.S. Code And *Pate v. Robinson*, 383 U.S. 375 (1966) Required Findings Before Ordering An Unrestored Incompetent To Trial. Lincoln Should Be Granted The Certificate Of Appealability To Raise This Issue On Appeal Or Other Appropriate Relief

II. Lincoln's Offense Conduct Occurred In 1989 Under A Narrow Statutory Judicial Interpretation. Lincoln's Conduct Did Not Violate The Prohibited Conduct In 1989 Under Circuit Law. Later The Statutory Scope Of Criminalized

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III. Lincoln's Counsel Both At Trial And On Appeal Failed To Object To The Above Denials Of Petitioner's Rights Therefore Allowing Him To Suffer Severe Prejudice Sufficient To Meet The Two Part Showing In *Strickland v. Washington*, 466 U.S. 688 (1984). Petitioner Merits The Opportunity To Appeal This Issue And Requests A Certificate Of Appealability To Proceed On Appeal Or Other Appropriate Relief

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PETITION FOR WRIT OF CERTIORARI OR OTHER APPROPRIATE RELIEF

PETITIONER WILLIAM F. LINCOLN ("LINCOLN") RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI BE ISSUED TO REVIEW THE JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ("ELEVENTH CIRCUIT"), IN THE CASE OF *WILLIAM F. LINCOLN V. UNITED STATES*, APP. NO. 01-12760-A, AS THAT JUDGEMENT PERTAINS TO LINCOLN'S RIGHT TO APPEAL HIS CLAIMS THAT HE WAS UNLAWFULLY CONVICTED BY RETROACTIVE APPLICATION OF LAW, RECEIVED INEFFECTIVE COUNSEL AND WAS CONVICTED WHILE UNDER JUDGEMENT AS A 'DE JURE' INCOMPETENT. PETITIONER SEEKS CERTIFICATES OF APPEALABILITY OR OTHER APPROPRIATE RELIEF.

OPINIONS BELOW

THE ELEVENTH CIRCUIT ISSUED A BRIEF DENIAL OF LINCOLN'S APPLICATION FOR CERTIFICATES OF APPEALABILITY, CONSISTING OF ONE SENTENCE, WHICH WAS NOT REPORTED.

STATEMENT OF JURISDICTION

THE JUDGEMENT OF THE ELEVENTH CIRCUIT WAS RENDERED FINAL ON MARCH 1, 2002 WHEN THE ELEVENTH CIRCUIT RULED ON AND DENIED LINCOLN'S REQUEST FOR RECONSIDERATION ON DENIAL OF CERTIFICATES OF APPEALABILITY. THE

JURISDICTION OF THIS COURT IS INVOKED UNDER *28 U.S.C. § 1254*(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME . . . NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW. . . ."

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

> "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, . . . AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE."

ARTICLE VI, UNITED STATES CONSTITUTION:

> "THIS CONSTITUTION, AND THE LAWS OF THE UNITED STATES WHICH SHALL BE MADE IN PURSUANCE THEREOF; . . . SHALL BE THE SUPREME LAW OF THE LAND; AND THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ... "

TITLE *18 U.S.C. § 4241(e)* DISCHARGE; IN PERTINENT PART:

> "WHEN THE DIRECTOR OF THE FACILITY IN WHICH A DEFENDANT IS HOSPITALIZED PURSUANT TO SUBSECTION (d) DETERMINES THAT THE DEFENDANT HAS RECOVERED . . . HE SHALL PROMPTLY FILE A CERTIFICATE TO THAT EFFECT WITH THE CLERK OF THE COURT THAT ORDERED THE COMMITMENT. THE CLERK SHALL SEND A COPY OF THE CERTIFICATE TO THE DEFENDANT'S COUNSEL AND TO THE ATTORNEY FOR THE GOVERNMENT. THE COURT SHALL HOLD A HEARING, CONDUCTED PURSUANT TO THE PROVISIONS OF *SECTION 4247(d)*, TO DETERMINE THE COMPETENCY OF THE DEFENDANT."

STATEMENT OF THE CASE

THIS CASE FLOWS FROM THE SECURITIES INDUSTRY. IN 1989 LINCOLN WENT INTO BUSINESS WITH TWO BROTHERS WHO WERE EXPERIENCED IN THE OPERATIONS OF STOCK OFFERINGS. LINCOLN MET THE SENIOR OF THESE TWO MEN IN THE COURSE OF SEEKING FUNDING FOR PRODUCTS TO PREVENT THE SPREAD OF THE AIDS VIRUS. IT WAS LINCOLN'S PLAN TO GO TO WORK FOR AN ESTABLISHED UNDERWRITER AND, ALONG THE WAY, GET THE UNDERWRITER TO FUND LINCOLN'S IDEAS. LINCOLN WAS OFFERED A PARTNERSHIP IN A NEW UNDERTAKING, WITH NO INVESTMENT ON HIS BEHALF. THE ONLY CATCH WAS THAT THE VARIOUS LICENSES FOR THE FIRM

"FIRST ALLIANCE" WOULD BE PUT IN LINCOLN'S NAME. THE REASON GIVEN WAS THAT DUE TO UNRESOLVED LIABILITIES OF A PERSONAL NATURE, THE SENIOR PARTNER, MR. CALVIN WORD, COULD NOT HOLD THE FIGUREHEAD POSITION WITH THE GOVERNMENT. LINCOLN CONSULTED WITH HIS ATTORNEY WHO TOLD LINCOLN TO BE CAREFUL PROMOTING STOCKS, BUT THAT LINCOLN COULD NOT BE HELD RESPONSIBLE CRIMINALLY FOR THE ACTIONS OF OTHERS – AS THE LAW STOOD. BASED UPON THIS NOTICE OF LAW, COUNSEL AND LINCOLN MET WITH THE N.A.S.D. REGULATORS, WHO APPROVED THE NEW VENTURE WITH LINCOLN AS THE NOMINAL FIGUREHEAD PRESIDENT. LINCOLN DID NOT KNOW THAT HIS NEW PARTNER WAS THE TARGET OF REGULATORS AND HAD A LONG COMPLIANCE HISTORY OF COMPLAINTS.

UPON THE HIRING OF MR. HARTNAGLE, THE FIRM'S OPERATIONS EXPERT, COUNSEL AGAIN ADVISED LINCOLN THAT AS THE LAW STOOD, LINCOLN COULD NOT BE HELD CRIMINALLY LIABLE FOR HARTNAGLE'S OFFENSES – SHOULD THEY OCCUR.

FIRST ALLIANCE SECURITIES BEGAN OPERATIONS IN MARCH 1989 AND LINCOLN WAS ASSOCIATED WITH THE FIRM UNTIL SEPTEMBER 1989 WHEN HE SOLD HIS INTERESTS AND LEFT THE SECURITIES BUSINESS. IN NOVEMBER 1993 LINCOLN AND HIS ASSOCIATES AT FIRST ALLIANCE WERE INDICTED BY A FEDERAL GRAND JURY IN THE NORTHERN DISTRICT OF GEORGIA. LINCOLN WAS CHARGED IN SIX OF THE COUNTS. THE SUPER

COUNT, OVERARCHING, QUALIFYING AND BEING REALLEGED WITHIN THE OTHER COUNTS WAS *COUNT ONE* VIOLATION OF *18 U.S.C. § 371*, CONSPIRACY. UNDER THE CIRCUIT LAW AS IT STOOD IN 1989, TITLE *18 U.S.C. § 371* HAD A NARROWED INTERPRETATION (*UNITED STATES V. HOPE*, 861 F.2d 1574 (11th CIR. 1988)). UNDER THAT INTERPRETATION, ONLY FRAUDS TARGETED AT THE GOVERNMENT WERE CRIMINALIZED BY TITLE *18 U.S.C. § 371*. PRIVATE FRAUDS WERE NOT PROHIBITED UNDER TITLE *18 U.S.C. § 371* FOR A PERIOD OF TIME UNDER CIRCUIT LAW. SUBSEQUENTLY, IN 1991 THE SCOPE OF CRIMINAL LIABILITY UNDER *18 U.S.C. § 371* WAS ENLARGED TO INCLUDE PRIVATE ENTITY TARGETS. SEE *U.S. V. FALCONE*, 939 F.2d 1455 (11th CIR. 1991) (EN BANC). THE DECISION WAS MADE RETROACTIVE TO *U.S. V. FALCONE*, 934 F.2d 1528 (11th CIR. 1991). FALCONE AND LINCOLN ARE DIFFERENT IN THAT FALCONE'S CONDUCT FELL OUTSIDE AND BEFORE *HOPE, ID.* LINCOLN'S FELL WITHIN THE PERIOD THAT *HOPE, ID.*, WAS GOOD LAW – AND "NOTICE" OF THE LAW AS IT STOOD. LINCOLN RELIED UPON *HOPE* AS HIS NOTICE THAT HE COULD NOT BE DRAWN INTO A CONSPIRACY SITUATION, AND NEVER WOULD HAVE RISKED THE SECURITIES BUSINESS HAD *HOPE* NOT BEEN THE LAW. THE EPISODE OF *HOPE, ID.*, IS NOW AN EMBARRASSMENT TO THE ELEVENTH CIRCUIT – BUT IS NO LESS VALID TO THOSE WHO RELIED UPON IT AND FELL WITHIN ITS NOTICE OF LAW.

LINCOLN PLED NOT GUILTY AND PROCEEDED TO TRIAL. ON OCTOBER 3, 1994, DEFENDANT'S TEMPORARY COUNSEL, JOHN GOGER, RAISED THE

ISSUE OF LINCOLN'S ABILITY TO STAND TRIAL AND ASSIST IN HIS OWN DEFENSE. AFTER COURT ORDERED EVALUATIONS, LINCOLN WAS COMMITTED TO BUTNER PSYCHIATRIC HOSPITAL AS INCOMPETENT TO STAND TRIAL PURSUANT TO *18 U.S.C. § 4241(d)*. AFTER FOUR MONTHS OF HOSPITALIZATION, LINCOLN WAS SENT BACK FOR A HEARING TO DETERMINE HIS COMPETENCY AND TO RECEIVE A "COMPETENCY RESTORATION" COURT ORDER TERMINATING HIS COMMITMENT PURSUANT TO *18 U.S.C. § 4241(e)*. HOWEVER, THIS HEARING WAS NEVER HELD, (TO THIS DAY LINCOLN'S COMPETENCY HAS NOT BEEN RESTORED TO HIM AS A MATTER OF LAW AND RIGHT PURSUANT TO THE GATEKEEPING PROVISIONS OF *18 U.S.C. § 4241(e)*.

LINCOLN PROCEEDED TO TRIAL ON AUGUST 14, 1995. DURING THE TRIAL OPEN HOSTILITY BROKE OUT BETWEEN DEFENSE COUNSEL KIRWAN AND LINCOLN. BY GOVERNMENT COUNT OVER 25 BREAKDOWNS AND DISRUPTIONS OCCURRED DURING THE TRIAL. A MID-TRIAL BREAKDOWN REQUIRED AN AMBULANCE, RECESS AND BRIEF HOSPITALIZATION. ACCORDING TO THE RECORD (LINCOLN HAS NO RECALL OF MANY TRIAL EVENTS), LINCOLN WAS PERMITTED TO TAKE THE STAND WITHOUT COUNSEL AND DELIVER HIS TESTIMONY WITHOUT COUNSEL'S GUIDING HAND.

CALLED A RAMBLING, AT TIMES INCOHERENT NARRATIVE, IT WAS PUNCTUATED BY A BREAKDOWN AND AMBULANCE TRIP TO GRADY HOSPITAL. TRIAL PROCEEDED WITH THE DEFENDANT

WITHOUT COUNSEL AT THE MOST CRITICAL POINT OF THE PROCEEDINGS.

IF LINCOLN WAS NOT COOPERATING AND ACCEPTING COUNSEL'S GUIDING HAND AT HIS TESTIMONY, THEN BY THE STANDARD OF LAW LINCOLN WAS NOT ASSISTING IN HIS DEFENSE AND WAS NOT COMPETENT AT TRIAL. SEE *DUSKY V. UNITED STATES*, 362 U.S. 402 (1960).

ON AUGUST 21, 1995 THE JURY RETURNED A GUILTY VERDICT ON FIVE COUNTS. LINCOLN APPEALED, APPOINTED APPELLATE COUNSEL, ARGUED THAT THE TRIAL COURT SHOULD HAVE HELD A COMPETENCY HEARING MID-TRIAL, AT THE POINT OF MID-TRIAL BREAKDOWN ON THE WITNESS STAND. SHE OVERLOOKED THE FACT THAT THE RESTORATION HEARING PURSUANT TO *18 U.S.C. § 4241(e)* WAS NEVER HELD TO BEGIN WITH. SHE CORRECTLY APPEALED ON THE BASIS OF BROAD INEFFECTIVENESS OF COUNSEL, CITING NUMEROUS EGREGIOUS ACTS AND OMISSIONS PREJUDICING LINCOLN BY TRIAL COUNSEL.

THE ELEVENTH CIRCUIT ISSUED A NON-PUBLISHED OPINION AFFIRMING THE CONVICTION, REMANDING IN PART AS TO RESTITUTION AND DIRECTING THAT THE INEFFECTIVE COUNSEL CLAIMS BE RAISED LATER BY A *28 U.S.C. § 2255* APPLICATION. SEE *UNITED STATES V. LINCOLN*, 163 F.3d 1358 (11th CIR. 1997). LINCOLN SUBSEQUENTLY FILED THE *28 U.S.C. § 2255* ACTION RECOMMENDED BY THE ELEVENTH CIRCUIT, PETITIONER WAS RELEASED FROM PRISON ON OCTOBER 1999 ON AN EX POST FACTO/INEFFECTIVE

ASSISTANCE OF COUNSEL SENTENCING GROUND. THE TRIAL COURT SUMMARILY DENIED THE OTHER GROUNDS, WHICH ARE THE ISSUES RAISED HEREIN THAT LINCOLN SEEKS RELIEF FOR.

THE EVIDENCE THAT TRIAL COUNSEL WAS INEFFECTIVE IS GROSS AND MONUMENTAL. APPELLATE COUNSEL WAS STUNNED AND SHE RISKED HER FUTURE RELATIONS IN THE LEGAL COMMUNITY TO TAKE TO TASK ANOTHER ATTORNEY, AND CALL HIM INEFFECTIVE ON BEHALF OF A PRISONER WHO COULD NOT REWARD HER BRAVERY.

THE ELEVENTH CIRCUIT, RESPONDING TO LINCOLN'S APPEAL DUE TO INEFFECTIVE COUNSEL STATED, "IN GENERAL, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE NOT CONSIDERED ON DIRECT APPEAL BUT ARE APPROPRIATELY RAISED IN A COLLATERAL ATTACK ON THE CONVICTION UNDER *28 U.S.C. § 2255*." THE COURT WENT ON TO STATE THAT IN DECLINING TO ADDRESS THE ISSUE LINCOLN WAS FREE TO RAISE IT LATER WITHOUT PREJUDICE.

LINCOLN FILED HIS MOTION PURSUANT TO *28 U.S.C. § 2255; § 2241* ON AUGUST 31, 1999 WITH A SUPPLEMENT THERETO FILED ON OCTOBER 4, 1999. SEE *APPENDIX – F* THE DISTRICT COURT, AT THE GOVERNMENT'S SUGGESTION IN THEIR RESPONSE, REDUCED THE SENTENCE, BUT DENIED THE MAIN GROUNDS ATTACKING THE CONVICTION – WHICH WERE THE FRUITS OF THE SAME INEFFECTIVENESS OF COUNSEL. SEE *APPENDIX – E* NOTICE OF APPEAL WITH INCORPORATED

GROUNDS FOR CERTIFICATES OF APPEALABILITY. SEE *APPENDIX* – D THE DISTRICT COURT ADOPTS GOVERNMENT RESPONSE AND DENIES LINCOLN'S APPLICATION FOR LEAVE TO APPEAL. SEE *APPENDIX* – C NOTICE OF APPEAL ON DENIAL OF CERTIFICATES OF APPEALABILITY TO UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT. SEE *APPENDIX* – B THE ELEVENTH CIRCUIT DENIES THE REQUEST FOR CERTIFICATES; LINCOLN FILES A MOTION FOR RECONSIDERATION. SEE *APPENDIX* – G. AFTER RECONSIDERATION THE ELEVENTH CIRCUIT AGAIN DENIES LINCOLN'S APPLICATION FOR CERTIFICATES OF APPEALABILITY. SEE *APPENDIX* – A LINCOLN THEN FILES THIS PETITION WITH THE UNITED STATES SUPREME COURT.

REASONS FOR GRANTING THE WRIT

PETITIONER LINCOLN IS INNOCENT, AND NEVER INTENDED ANY FRAUD. THIS CASE IS IMPORTANT AND DESERVES ITS DAY IN COURT ON THESE ISSUES. BEYOND THE INEFFECTIVE COUNSEL CLAIM, THE PETITION HIGHLIGHTS A KEY STRUCTURAL DEFECT THAT SHOULD NOT BE OVERLOOKED BY COURTS.

BETWEEN THE MENTAL HOSPITAL AND THE COURTROOM, A HEARING, OR TRIAL SHOULD NOT OCCUR. A FORMAL RESTORATION OF COMPETENCY SHOULD OCCUR AS CONGRESS DIRECTED PRETRIAL IN *18 U.S.C. § 4241(e).*

AN INCOMPETENT PERSON CANNOT GRANT WAIVERS. LINCOLN NEVER WAIVED ANY COMPETENCY HEARING. FURTHER, CORNER CUTTING APPOINTED COUNSEL WAS NEVER AUTHORIZED BY LINCOLN TO WAIVE A HEARING. LINCOLN WENT TO TRIAL AND WAS CONVICTED WHILE STILL UNDER A FORMAL ORDER DECLARING HIM INCOMPETENT. INCOMPETENCY IS A LEGAL STATUS, IMPOSED BY LAW, BY COURT ORDER. COMPETENCY IS TO BE RESTORED THE SAME WAY IT IS TAKEN. CITIZENS HAVE THE RIGHT TO FORMAL FINDINGS, AND IF SUFFICIENT, TO BE RESTORED AGAIN TO THEIR COMPETENT STATUS.

IT WOULD BE HARD TO IMAGINE A MORE IMPORTANT NEED FOR A FINDING OF COMPETENCY THAN PRETRIAL. CONGRESS AGREES AND HAS SET OUT A GATEKEEPING SYSTEM TO BE FOLLOWED IN *18 U.S.C. § 4241(e)*. IT WAS NOT FOLLOWED IN LINCOLN'S CASE, PREJUDICING LINCOLN.

COUNSEL WHO FAILS TO SECURE A RELEASE FROM INCOMPETENT STATUS FOR HIS CLIENT BEFORE TRIAL IS INEFFECTIVE. LINCOLN WAS NOT COMPETENT AT TRIAL. INEFFECTIVE ASSISTANCE OF COUNSEL WAS PRESERVED ON APPEAL AND NEVER PROCEDURALLY DEFAULTED. MOREOVER, LINCOLN IS STILL TO THIS DAY "DE JURE" INCOMPETENT BY A COURT ORDER THAT HAS NEVER BEEN OFFSET BY AN ORDER RESTORING COMPETENCY.

IF PETITIONER IS GRANTED RELIEF, IT WILL OPEN FOR THIS HONORABLE COURT THE OPPORTUNITY TO MAKE THE POINT THAT BEFORE TRIAL

AN INCOMPETENT ADJUDICATED PERSON MUST RECEIVE THEIR RESTORATION OF COMPETENCY. LINCOLN ALSO QUESTIONS A TRIAL COURT'S JURISDICTION TO TRY ADJUDICATED INCOMPETENTS. SEE *APPENDIX – I*, GOVERNMENT'S CONCESSION THAT THE RESTORATION HEARING WAS NOT HELD. SEE *APPENDIX – J*.

FROM THE INCEPTION OF THE PROSECUTION LINCOLN'S CASE WAS MARRED BY INEFFECTIVE COUNSEL. COUNSEL FAILED TO OBJECT TO AND PROTECT LINCOLN FROM AN IMPERMISSIBLE EX POST FACTO-LIKE RETROACTIVE APPLICATION OF JUDICIAL ENLARGEMENT OF STATUTE. LINCOLN'S ALLEGED OFFENSE CONDUCT OCCURRED DURING 1989 UNDER THE LAW OF *UNITED STATES V. HOPE*, 861 F.2d 1574 (11th CIR. 1988) WHICH RESTRICTED THE CIRCUIT'S CRIMINALIZED SCOPE OF CONDUCT UNDER *18 U.S.C. § 371* TO CONDUCT THAT TARGETED THE GOVERNMENT OR ITS AGENCIES. HOWEVER, LINCOLN'S INDICTMENT AND JURY CHARGE TRACK THE CRIMINALIZED SCOPE OF CONDUCT REFLECTED IN THE JUDICIAL ENLARGEMENT OF CRIMINALIZED *18 U.S.C. § 371* SCOPE OF CONDUCT THAT OCCURRED IN 1991 IN *UNITED STATES V. FALCONE*, 939 F.2d 1455 (11th CIR. 1991) (EN BANC).

FOR TWO AND A HALF YEARS A REDUCED SCOPE OF CRIMINALIZED CONDUCT WAS THE LAW OF THE ELEVENTH CIRCUIT FOR *18 U.S.C. § 371* PROSECUTIONS. LINCOLN'S CONDUCT FELL TOTALLY WITHIN THAT TIME FRAME AND HE SHOULD BE ENTITLED TO THE NOTICE OF LAW AS IT STOOD. THIS COURT HAS HELD THAT RETROACTIVE

JUDICIAL ENLARGEMENTS OF CRIMINAL SCOPE OF CONDUCT ARE UNCONSTITUTIONAL. SEE *STANLEY MARKS V. UNITED STATES*, 430 U.S. 188, 51 L.ED.2D 260, 97 S.CT. 990 (1977) AND *BOUIE V. CITY OF COLUMBIA*, 378 U.S. 347, 12 L.ED.2D 894, 84 S.CT. 1697 (1964).

THE DISTRICT COURT HAS REPEATEDLY ADOPTED GOVERNMENT MISUNDERSTANDINGS AND MISINTERPRETATIONS OF THE LAW. *FALCONE'S* CASE, AND LINCOLN'S ARE DISTINCT BECAUSE LINCOLN'S CONDUCT FELL WITHIN THE PERIOD OF *HOPE* LAW. FALCONE'S CONDUCT WAS OUTSIDE *HOPE*'S TIME LIMITS. THE GOVERNMENT HAS NOT REALIZED THAT. ALSO, A KEY GOVERNMENT ERROR IS THAT THE GOVERNMENT ARGUES THAT THE *DATE* OF THE TRIAL FIXES THE SCOPE OF CRIMINALIZED CONDUCT THAT THE INDICTMENT AND JURY CHARGE TRACKS. SEE *APPENDIX – H* THE CORRECT STANDARD IS THAT THE LAW AT THE TIME OF THE OFFENSE CONDUCT CONTROLS THE CHARGING LANGUAGE OF THE INDICTMENT AND JURY CHARGE. LINCOLN WAS INDICTED WITH THE CRIMINAL SCOPE LANGUAGE OF THE POST *FALCONE* ENLARGEMENT AND HIS JURY WAS SIMILARLY CHARGED WITH THE ENLARGED SCOPE OF CONDUCT.

THE GOVERNMENT ENJOYED THE BENEFITS OF THE RULES ATTACHED TO THE CONSPIRACY PROSECUTIONS THAT OTHERWISE WOULD NOT HAVE BEEN AVAILABLE HAD THEY OBEYED THE LAW. FOR ANOTHER EXAMPLE OF ABUSE OF *HOPE* RETROACTIVELY BY THE GOVERNMENT, SEE: *UNITED STATES V. ADKINSON*, 135 F.3d 1363 (11th

CIR. 1998). LINCOLN'S COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THIS PREJUDICIAL ENLARGEMENT OF CRIMINAL SCOPE AND FOR ALLOWING HIS CLIENT TO BE CHARGED WITH IT WHILE INCOMPETENT. THIS PREJUDICIAL CONDUCT MEETS BOTH PRONGS OF *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 80 L.ED.2D 674, 104 S.CT. 2052 (1984). LINCOLN WOULD NOT HAVE BEEN CONVICTED UNDER THE LAW AS IT STOOD.

CONCLUSION AND PRAYER

LINCOLN RESPECTFULLY REQUESTS THAT THIS COURT GRANT THIS PETITION FOR WRIT OF CERTIORARI TO REVIEW THE MERITS OF THE ELEVENTH CIRCUIT'S DECISION BELOW FOR THE PURPOSE OF GRANTING HIM THE CERTIFICATES OF APPEALABILITY ON THE ISSUES *AND* IF FOR ANY REASON THIS HONORABLE COURT WOULD GRANT FURTHER RELIEF, *THEN PETITIONER WOULD ASK THIS COURT TO CONSTRUE THIS APPLICATION AS A DIRECT PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES SUPREME COURT.* I REMAIN

VERY RESPECTFULLY,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12760-A

1:93CR-506

WILLIAM F. LINCOLN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed March 1, 2001)

Before **ANDERSON, Chief Judge and DUBINA, Circuit Judge**.

BY THE COURT:

Upon reconsideration of this Court's order dated December 19, 2001, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed. 2d 542 (2000).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12760-A

WILLIAM F. LINCOLN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed Dec. 20, 2001)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Joel F. Dubina
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
Atlanta

WILLIAM F. LINCOLN,	§	CASE NO.
Petitioner,	§	1:99-CV-2245-GET
	§	
V.	§	Underlying,
UNITED STATES	§	CASE NO.
OF AMERICA,	§	1:93-CR-506-GET
RESPONDENT.	§	

NOTICE OF APPEAL TO ELEVENTH CIRCUIT, UNITED STATES COURT OF APPEALS

(Filed May 15, 2001)

Movant hereby gives notice of Appeal from this Court's denial of relief as entered in this Court's order of February 27, 2001; and again after reconsideration in its order of May 4, 2001. Movant seeks certificates of appealability on the following grounds;

1. Did the Court violate Lincoln's Fifth Amendment right to be protected from "ex post facto like" retroactive application of Judicial enlargements as set forth in the United States Supreme Court's *STANLEY MARKS V. UNITED STATES,* 430 US 188 (1977) (proscribing retroactive application of judicial enlargements of criminal code) where Lincoln was convicted on an indictment's criminal scope of conduct that was enlarged to include Lincoln's alleged conduct *two years after* the alleged criminal conduct and then retroactively applied to Lincoln to effect an unconstitutional indictment, trial, *jury charge* and sentencing?

2. The Government has conceded that the Competency Restoration hearing mandated by *18 USC § 4241(e)* was never held. This hearing cannot waived, and failure to hold the hearing divested the Court of Jurisdiction to take Lincoln to trial – the express written language of the Statute prohibits this denial, which was denied to Lincoln. The denial to Lincoln of this hearing, which was Congressionally mandated by U.S. Code *Title 18 USC § 4241*, denied to Lincoln his Constitutional protection of the law as expressly laid down by Congress, which barred the way for trial unless the hearing and determinations are made. These were never done. The trial proceeded outside the law and was without Jurisdiction and in violation of the *Fifth and Sixth Amendment Rights* of Lincoln. The Court should issue a Certificate on this ground for appeal.

3. Did Counsel's failure to object to the above Constitutional violations of Lincoln's rights and protections under the law violate Lincoln's Sixth Amendment Right to effective assistance of counsel?

Movant requests certificates of appealability on the above issues. Should this Court or the Government desire further briefing or clarification on the above application Movant would be pleased to supply it.

Respectfully,

/s/ William F. Lincoln
William F. Lincoln,
Movant, pro se

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true copy of the attached legal document to the office of the UNITED STATES ATTORNEY, Attn: Charysse L. Alexander,

AUSA, 1800 US Courthouse, 75 Spring St., SW Atlanta, Ga. 30303 by First class U.S. Mail or delivered by hand.

5/14/01
Date

/s/ William F. Lincoln
WILLIAM F. LINCOLN,
PRO SE
637 Earl's Slough Ct
Tallahassee, Fl 32312

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA

WILLIAM F. LINCOLN, Petitioner,	§	CASE NO. 1:99-CV-2245-GET
V.	§	UNDLY. No.
UNITED STATES OF AMERICA, Respondent.	§	1:93-CR-506-GET 28 USC §2255; §2241 ACTION

NOTICE OF APPEAL
ON
DENIAL OF CERTIFICATE OF APPEALABILITY

Comes now William F. Lincoln, petitioner pro se and enters his notice of appeal to this Court's orders denying certificates of appealability entered by this Court on August 29, 2001 and again denying reconsideration of same entered by this Court on October 1, 2001 (exhibit A).

Petitioner had motioned for certificates of appealability on May 15, 2001 (exhibit B) and, after this Court denied the application on August 29, 2001, he filed for reconsideration (exhibit C). Petitioner had previously given notice of appeal on this Court's denial of relief for wrongful and unconstitutional conviction and the present notice of appeal is pursuant to having those issues certified for hearing on a perfected appeal.

Respectfully,

/s/ William F. Lincoln
William F. Lincoln,
Petitioner, pro se

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true copy of the attached legal document to the office of the UNITED STATES ATTORNEY, Attn: Charysse L. Alexander, AUSA, 1800 US Courthouse, 75 Spring St., SW Atlanta, Ga. 30303 by First class U.S. Mail or delivered by hand.

5/14/01
Date

/s/ William F. Lincoln
WILLIAM F. LINCOLN,
PRO SE
637 Earl's Slough Ct
Tallahassee, Fl 32312

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. WILLIAM F. LINCOLN	CRIMINAL ACTION NO. 1:93-CR-506-GET CIVIL ACTION NO. 1:98-CV-3036-GET

ORDER

Defendant's motion for reconsideration of the court's denial of his application for a certificate of appealability is DENIED.

SO ORDERED, this 1 day of October, 2001.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL,
JUDGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. WILLIAM F. LINCOLN	CRIMINAL ACTION NO. 1:93-CR-506-GET CIVIL ACTION NO. 1:99-CV-2245-GET

ORDER

(Filed May. 4, 2001)

On or about March 9, 2001, the defendant in the above-styled matter filed a motion for reconsideration seeking to have this court reconsider its order of February 27, 2001.

Said motion for reconsideration is hereby OVERRULED and DENIED.

SO ORDERED, this 4 day of May, 2001.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL,
JUDGE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA Plaintiff, v. WILLIAM F. LINCOLN Defendant.	CRIMINAL NO. 1:93-CR-506-GET CIVIL NO. 1:98-CV-3036-GET

ORDER

(Filed Aug. 29, 2001)

The defendant in the above-styled matter has filed a notice of appeal to the Eleventh Circuit United States Court of Appeals.

The Court construes said notice of appeal as an application for a certificate of appealability.

For the reasons set forth in the government's response to the defendant's notice of appeal, the government's response being dated August 17, 2001, the defendant's application for a certificate of appealability is hereby DENIED.

SO ORDERED, this 29 day of August, 2001.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL,
JUDGE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
Atlanta

WILLIAM F. LINCOLN,	§	CASE NO.
Petitioner,	§	1:99-CV-2245-GET
	§	
V.	§	Underlying,
UNITED STATES	§	CASE NO.
OF AMERICA,	§	1:93-CR-506-GET
RESPONDENT.	§	

NOTICE OF APPEAL TO ELEVENTH CIRCUIT, UNITED STATES COURT OF APPEALS

(Filed May 15, 2001)

Movant hereby gives notice of Appeal from this Court's denial of relief as entered in this Court's order of February 27, 2001; and again after reconsideration in its order of May 4, 2001. Movant seeks certificates of appealability on the following grounds;

1. Did the Court violate Lincoln's Fifth Amendment right to be protected from "ex post facto like" retroactive application of Judicial enlargements as set forth in the United States Supreme Court's *STANLEY MARKS V. UNITED STATES,* 430 US 188 (1977) (proscribing retroactive application of judicial enlargements of criminal code) where Lincoln was convicted on an indictment's criminal scope of conduct that was enlarged to include Lincoln's alleged conduct *two years after* the alleged criminal conduct and then retroactively applied to Lincoln to effect an unconstitutional indictment, trial, *jury charge* and sentencing?

2. The Government has conceded that the Competency Restoration hearing mandated by *18 USC § 4241(e)* was never held. This hearing cannot be waived, and failure to hold the hearing divested the Court of Jurisdiction to take Lincoln to trial – the express written language of the Statute prohibits this denial, which was denied to Lincoln. The denial to Lincoln of this hearing, which was Congressionally mandated by U.S. Code *Title 18 USC § 4241*, denied to Lincoln his Constitutional protection of the law as expressly laid down by Congress, which barred the way for trial unless the hearing and determinations are made. These were never done. The trial proceeded outside the law and was without Jurisdiction and in violation of the *Fifth and Sixth Amendment Rights* of Lincoln. The Court should issue a Certificate on this ground for appeal.

3. Did Counsel's failure to object to the above Constitutional violations of Lincoln's rights and protections under the law violate Lincoln's Sixth Amendment Right to effective assistance of counsel?

Movant requests certificates of appealability on the above issues. Should this Court or the Government desire further briefing or clarification on the above application Movant would be pleased to supply it.

Respectfully,

/s/ William F. Lincoln
William F. Lincoln,
Movant, pro se

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. WILLIAM F. LINCOLN	CIVIL ACTION NO. 1:99-CV-2245-GET 1:93-CR-506-1

ORDER

(Filed Oct. 19, 1999)

This matter is before the Court on the Defendant WIlliam Lincoln's Motion for Immediate Release Pursuant to Title 28, United States Code, Section 2255. The Court has reviewed Defendant William Lincoln's motion, and has determined that the issue raised by Defendant Lincoln regarding the application of both U.S.S.G. Section 3B1.1 (Aggravating Role in the Offense) and U.S.S.G. Section 3B1.3 (Abuse of Position of Trust) to calculate the defendant's sentencing guideline range has merit. In the Government's response to Defendant Lincoln's Motion, the Government agrees that the version of the United States Sentencing Guidelines which should have been used to calculate Defendant Lincoln's sentence did not permit the application of both Section 3B1.1 and Section 3B1.3.

IT IS ORDERED, therefore, that Defendant Lincoln's total offense level is reduced by two levels to Level 24 to reflect the removal of two points for Abuse of Position of Trust and Use of A Special Skill. In all other

respects, the guidelines calculations in William Lincoln's Presentence Report remain the same.

IT IS FURTHER ORDERED THAT Defendant William Lincoln's sentence is hereby modified by reducing the term of imprisonment from 78 months to 63 months. In all other respects the sentence imposed on Defendant Lincoln on November 21, 1995, as amended on January 14, 1999, remains the same.

SO ORDERED, this 19 day of October, 1999.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL,
UNITED STATES
DISTRICT JUDGE

Presented by:
CHARYSSE L. ALEXANDER

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM F. LINCOLN, MOVANT,	:	CASE NO. 1:99-CV-2245 GET
V.	:	
UNITED STATES OF AMERICA	:	Section 2255; 2241 ACTION

SUPPLEMENT TO MOTION PURSUANT TO § 2255; 2241
COURT WAS DIVESTED OF JURISDICTION BY STATUTE

(FILED OCT 4 1999)

Comes now William F. Lincoln, Movant herein and for good cause enters a supplemental pleading in the above styled action as follows;

1. On August 24, 1999 Petitioner Lincoln filed a Motion for release pursuant to § 2255; 2241. The Government has been given until October 18, 1999 to respond and has not done so yet. The following issues of law are submitted *for the Court's determination*, however the Government is likewise served should they wish to amplify their response to include these key Jurisdictional issues;

2. THIS COURT LACKED JURISDICTION TO TAKE LINCOLN TO TRIAL AS A CLEAR MATTER OF DIVESTMENT BY STATUTORY OPERATION. PRE-TRIAL, LINCOLN WAS COMMITTED PURSUANT TO *18 USC4241*(d). LINCOLN WAS RELEASED

BACK TO THE DISTRICT COURT FOR A COMPETENCY RESTORATION HEARING. A PROTECTION REQUIRED BY *18 USC § 4241(e)*. THIS HEARING WAS NEVER HELD AS REQUIRED BY THE PROTECTIVE PLAIN LANGUAGE OF *18 USC§ 4241(e)* DIVESTING THE COURT OF JURISDICTION TO TAKE AN UNRESTORED INCOMPETENT TO TRIAL. LINCOLN'S CONVICTION MUST BE VACATED AS A MATTER OF LAW.

3. THE COURT SENTENCED LINCOLN TO 78 MONTHS IN PRISON ON COUNT ONE CONSPIRACY IN VIOLATION OF *18 USC§ 371*; THE COURT LACKED JURISDICTION TO DO THIS BECAUSE THE STATUTORY LANGUAGE LIMITS THIS SENTENCE TO A MAXIMUM OF 60 MONTHS IMPRISONMENT.

4. Lincoln never attended a Competency restoration hearing after his period at Butner. Although Attorney Goger motioned for a hearing, it was never held. Title *18 USC§ 4241(e)* specifies that the hearing be in conformity with *18 USC§ 4247*, which requires a full adversarial hearing with Lincoln present. This was never done. After Attorney Kirwan took over he failed to press for the hearing. A careful study of the case docket shows that there were an in chambers hearing concerning Mr. Hart's need as a witness, and there was a Faretta hearing after Lincoln applied to represent himself. There was no "restoration of competency" hearing held as required by the statute. This is required for *PRETRIAL competency cases*. Post conviction law does not require the resoration [sic] hearing. On appeal Lincoln directed appellate counsel to argue this. She instead mis-understood the law and at page 20 of Lincoln's Brief mis-stated the law, applying the wrong statute to Lincoln's argument citing *18 USC§ 4244* as the ruling statute, when in fact it was *18*

USC§ 4241(d)(e) (mandating the "restoration" hearing). This key procedural safeguard is a "Gatekeeping" protection for Lincoln and is *non-waivable* (see *PATE V. ROBINSON*) and must be held or *the incompetent cannot be put to trial*. The Statute is clear on this. Appellate Counsel was ineffective in failing to argue this. Pretrial Counsel was ineffective for failing to persue [sic] the Hearing with the Court, and for failing to object to the absence of hearing. The *Court had no Jurisdiction to take Lincoln to trial* without the "Restoration of his Competency", and such trials as held contrary to law are invalid and the verdict so gained must be vacated as a matter of law.

Respectfully,

/s/ William F. Lincoln
William F. Lincoln,
Petitioner/Movant

CERTIFICATE OF SERVICE

I William F. Lincoln, the Movant herein Certify that I have this day served upon the Office of The United States Attorney, 75 Spring St. SW, Atlanta, Ga. 30303 a true copy of the attached SUPPLEMENT TO MOTION PURSUSANT [sic] TO § 2255; 2241 by prepaid First Class U.S. Mail.

Sept. 29, 99
DATE

/s/ William F. Lincoln
WILLIAM F. LINCOLN
NO. 44505019 B1
FCC COLEMAN LOW
P.O. BOX 879
COLEMAN, FL. 33521-8996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA

WILLIAM F. LINCOLN,	:	CASE NO.
MOVANT-PETITIONER,	:	1:99-CV-2245-GET
V.	:	(Prior NO.
UNITED STATES OF AMERICA,	:	1:93-CR-0506 GET)
	:	MOTION PURSUANT TO
RESPONDENT.	:	§ 2255; § 2241
	:	

MOTION FOR IMMEDIATE RELEASE PURSUANT TO:

TITLE 28 USC § 2255; § 2241

(Filed Aug. 31, 1999)

Comes now William F. Lincoln, movant-petitioner pro se and motions this Honorable Court for immediate release according to law, and the vacating and setting aside of his conviction entered by this Court on November 22, 1995 for good cause showing, according to established precedent, as follows;

1. INTRODUCTION

This is movant's first post-conviction collateral attack and is made within the one year limit pursuant to the *1996 A.E.D.P.A.* and is timely. The Eleventh Circuit Court

of Appeals referred the issue of ineffective assistance of counsel to the trial Court via a *§2255* application to expand the record in their opinion of November 17, 1998. Movant herein brings a collateral challenge against his conviction and sentence charging: 1) Movant was denied the effective advice and assistance of counsel pre-trial, at trial, sentencing and on appeal in violation of the *Sixth Amendment;* 2) Movant was given a two-point enhancement in violation of the *ex post facto clause* for abuse of trust *3B1.3* combined with aggravated role *3B1.1* which was not permitted in Movant's adopted 1988 USSGuidelines (substantive Amendment in 1990) for his 1989 offense conduct. This violates Circuit law. *US.V.BAILEY,* 123 F3d 1381, 1402-6 (11 Cir 1997); *U.S. V. SUMMERS,* 176 F3d 1328, 1330-1 (11 Cir 1999). 3) Movant was convicted in violation of *MARKS V UNITED STATES,* 430 US 188, 51 L ed 2d 260, 97 S Ct 990 (1977) (Hons. Powell, Burger, White, Blackmun, Rehnquist, Brennan, Stewart, Marshall and Stevens – Unanimous on issue) in that Movant was subjected to an unforeseeable judicial enlargement that was made after the alleged offense conduct, and retroactively applied against him in violation of the fifth Amendment denying him proper notice of the law and requiring reversal as a matter of clear Supreme Court and Circuit precedent.

2. NO PROCEDURAL BAR

On direct review Movant raised the issue of ineffective assistance of counsel and argued it. The Eleventh Circuit ruled that the issue should be presented in a *§2255* application to expand the record. So as an initial matter, Movant is following the Eleventh Circuit's opinion and making the application as advised by the higher Court.

There is no bar to a charge of ineffective assistance of counsel, especially here where it was raised at sentencing and appeal. See *MURRAY V. CARRIER,* 477 US 478, 496 (1986). Additionally, the two ex post facto violations involve the inherent question of Jurisdiction to apply the Guidelines (see *STINSON V. UNITED STATES,* 508 US 36, 42 (1993)) in an ex post facto manner and the question of whether the Court had Jurisdiction to return an indictment for *18 USC§371* Conspiracy where the Grand Jury was never told the definition of the law under the law of the offense conduct which was controlled by *UNITED STATES V. HOPE,* 861 F 2d 1574 (11 Cir 1988). Questions of Jurisdiction cannot be waived or procedurally defaulted, see *HARRIS V. UNITED STATES,* 149 F 3d 1304, 1308 (11 Cir 1998). Additionally, there is no procedural bar where the individual was subjected to a "fundamental defect which inherently results in a complete miscarriage of justice" *or* "an omission inconsistent with the rudimentary demands of fair procedure". *HILL V. UNITED STATES,* 368 US 424, 428 (1962); *MURRAY V. CARRIER,* (Id.); *REED V. FARLEY,* 512 US 339, 350, 354 (1994) or is legally innocent *GONZALEZ V. ABBOTT,* 967 F 2d 1499 (11 Cir 1992) (no default when actually innocent of statute); *SCHLUP V. DELO,* 513 US ___, 130 LEd 2d 808, 115 SCt ___ (1995) (no bar if innocence is in question). The Movant is innocent of the conduct of conviction because the Court *convicted him on the enlarged Statutory scope* but presented no evidence of guilt (or allegation in the indictment) that applied to the violation of the law *as it stood at the time of the alleged criminal conduct in 1989.* The "anchor count" of the indictment which took up 60% of the document involved a violation of title *18 USC§371* Conspiracy, which was brought in direct violation of Supreme Court proscription in *MARKS V. UNITED*

STATES, (supra). Movant is entitled to have the merits of his case decided.

3. STATEMENT OF FACTS

Movant was indicated for six counts of alleged violations involving the brief operation of a small Atlanta securities firm in 1989. The indictment was returned after the Eleventh Circuit had enlarged the scope of *18 USC§371* to include proscribing the targeting of private investors. The prior law that applied at the time of the alleged offense conduct limited the scope of title *18 USC§371* Conspiracy to those conspiracies that targeted the Federal Government only. Despite this, on November 22, 1993 the U.S. Grand Jury for the Northern District of Geergia [sic] indicted Movant for allegedly targeting private investors under Title *18 USC§371* Conspiracy applying the new expanded scope of proscribed conduct retroactively upon Movant. The Conspiracy count was realleged and reincorporated into and across five substantive counts that were three securities trading counts and two funds transport counts. Trial commenced August 14, 1995 and ended August 21, 1995. On November 22, 1995 Movant was sentenced to a term of imprisonment of 78 months and 3 years supervised release. On November 17, 1998 Movant's appeal was affirmed in part and vacated as to restitution, with the ineffective counsel claims referred for §2255 application. No appeal is pending. Movant is incarcerated having completed a 63 month sentence (PT+SGT).

4. THE FACTUAL RECORD, MOVANT PRESERVED GROUNDS ON RECORD

Movant's case is unlike most other prisoners' post-conviction motions, which are often brought as a last resort with last minute unpreserved grounds for relief. First, Movant raised the issue of Counsel's inability to handle a securities law defense without consulting with securities counsel, or "boning-up" in a pro se filing on docket on March 14, 1995, as required by the Georgia Bar. In the same motion Movant complained that the *18 USC§371* Conspiracy count was wrong and should not be applied in his case. Two protest filings were put on docket during the trial phase complaining of Counsel's failure to call any witnesses (which forced Movant to rebut the perjuries himself) and listing many valuable exhibits for his defense that Counsel failed to admit into evidence (Counsel put only one document into evidence for Movant). On the last day of the trial, on record, Movant sought to overcome his Counsel's ineffectiveness and admit some very pertinent exhibits that impeached the perjury of some witnesses by bringing into the Courtroom and stacking the marked exhibits on the defense table. Surprised Counsel blurted out that the exhibits were all hearsay, which was a lie – Counsel did not even examine the exhibits, which included such items as cancelled checks impeaching Hartnagle's testimony and copies of prospectuses registered by the Securities and Exchange Commission showing that the Stocks sold were all legally registered for sale in the United States (something the Jury would doubt given the prosecutor's harrange).

The Court cannot be blamed, given Counsel's conduct. The Court had very generously authorized a special expenditure of $7,000.00 for photocopies of the record

which contained hundreds of favorable documents that showed good faith (ie. signed consents of investors of the high risks, records showing that Movant bought loss insurance for the investors, disciplinary records showing Movant firing salesmen-brokers for lying to clients etc.) by Movant in obeying the law. Within 7 days after the unfair trial, Movant filed a pro se motion for new trial under *Rule 33,* citing the failure of Counsel to protect Movant's *Sixth Amendment* right to effective counsel. Counsel did not speak to Movant from the last day of trial until Movant sat down at the sentencing hearing, at which time Movant requested that objections be entered to the Pre-sentence report such as the *ex post facto* violation being argued herein. Counsel refused to object. Movant rose at allocution and made a lengthly complaint on record to preserve his defenses, during which Movant argued that the *18 USC§371 Conspiracy* count was unconstitutional as applied to him, and that the 2pt. enhancement violated the *ex post facto clause* (indeed, Movant preserved *all* exposit facto rights on record) and that Counsel was ineffective counsel. On appeal, Movant raised the same issues in various pro se filings and in letters to his Counsel. Movant has the copies of the correspondence and appellate filings. The record is very ample here. If the government wishes to dispute the facts at an evidentiary hearing, Movant has overwhealming [sic] factual evidence to support his claims. Movant is ready to expand the record, should the Government contest the facts, as advised in the Eleventh Circuit Court of Appeals decision of November 17, 1998.

5. CONSTITUTIONAL VIOLATIONS CONSTITUTIONAL VIOLATION I, INEFFECTIVE ASSISTANCE OF COUNSEL

Overarching and perfusing the following Constitutional violations is the denial of Movant's Sixth Amendment Right to the effective advice and assistance of counsel, pre-trial, at trial, at sentencing and on appeal as delineated in *STRICKLAND V. WASHINGTON,* 466 US 668 (1984); *HOLSOMBACK V. WHITE,* 133 F3d 1382 (11 Cir 1998); *SMITH V. WAINWRIGHT,* 777 F2d 609 (11 Cir 1985). Incorporated within the showing of ineffective counsel, but having sufficient merit for relief on their own grounds are;

CONSTITUTIONAL VIOLATION II, ex post facto sentence enhancement for *§3B1.3*

CONSTITUTIONAL VIOLATION III, Fifth Amendment Violation for retroactive application of Judicial statutory enlargement in violation of *MARKS V. UNITED STATES,* 430 US 188 (1977)

CONSTITUTIONAL VIOLATION IV, jurisdictional questions

Subsequent to the above arguments and authorities, an additional few paragraphs will be presented, as they were to the U.S. Court of Appeals, concerning ineffective assistance of counsel entitled: *ACTS AND OMISSION OF COUNSEL PREJUDICING MOVANT.*

CONSTITUTIONAL VIOLATION II

Counsel failed to object at sentencing when an enhancement under U.S.S. Guidelines §3B1.3. (abuse of trust) *was applied together with an enhancement pursuant*

to § 3B1.1. (aggravating role), *a combination which is prohibited by the substantive language of Movant's 1988 U.S.S.G. Manual.*

A prisoner may attack a sentence imposed in violation of the U.S. Constitution in a Section 2255 application. *SHUKWIT V. UNITED STATES,* 973 F 2d 903, 904 (11 Cir 1992).

Movant's pre-sentence report adopted the 1998½ *U.S.S.G.* because it was the most favorable for him. However, the report contained an error. It cited a two-point enhancement for abuse of trust *§ 3B1.3.* and a four point enhancement for aggravating role *§ 3B1.1.,* which the Guidelines do not permit:

> "This adjustment may not be employed in addition to that provided for in § 3B1.1, nor may it be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." (substantive language of *§ 3B1.3.,* in pertinent part, USSG 1988½ see *EXHIBIT A* hereto)

The ex post facto application of the sentencing guidelines is not permissible. *MILLER V. FLORIDA,* 482 US 423 (1987), *ACCORD, UNITED STATES V. BAILEY,* 123 F 3d 1381, 1402-6 (11 Cir 1997); *UNITED STATES V. SUMMERS,* 176 F 3d 1328, 1330, (11 Cir 1999). Counsel did not come to visit or advise Movant before sentencing, and did not review the pre-sentence report with him, which is not a reasonable strategy. *UNITED STATES V. BARTHOLOMEW,* 974 F2d 39 (5 Cir 1992). Counsel's failure to timely object to an improper enhancement at sentencing meets both prongs of *STRICKLAND* (supra). *HARRISON V. JONES,* 880 F2D 1279 (11 Cir 1989);

ACCORD, MATTRE V. WAINWRIGHT, 811 F2d 1430, 1438 (11 Cir 1987); *UNITED STATES V. ACKLEN,* 47 F3d 739 (5 Cir 1995) (prejudice prong of *Strickland* in non-capital cases met by showing defendant would have received less harsh sentence absent counsel's errors or omissions); *NICHOLS V. UNITED STATES,* 75 F3d 1137 (7 Cir 1996) (prejudice established where sentencing unreliable due to counsel's errors). At sentencing Movant could not do more than enter his own objection at allocation to the enhancement, because counsel had failed to object in writing with sufficient time for the Government to investigate and respond. Movant notified Appellate counsel in writing of the improper enhancement, but she ignored the request and instead raised frivolous issues such as complaining about pre-trial credits (parroting sentencing counsel's error in that respect) which, as the Eleventh Circuit pointed out, is the responsibility of the Bureau of Prisons to address. Appellate counsel's failure to raise a valid highly meritorious issue is prejudicial and ineffective (especially here where she was asked). *ORAZIO V. DUGGER,* 876 F2d 1508 (11 Cir 1989); *HEATH V. JONES,* 941 F2d (11 Cir 1991); (counsel obligated to raise valid issues plain on record for appeal); *UNITED STATES V. COOK,* 45 F3d 388 (10 Cir 1995) (failed to raise "dead bang winner"); *RESTREPO V. KELLEY,* 178 F3d 634 (2 Cir 1999) (failure to raise issue plain on record, appellate ineffectiveness).

Movant respectfully requests that the "one book rule" prevail and that the improper sentence enhancement be corrected. Movant's equal co-defendant received a sentence of 60 months and is now released. Movant has completed 63 months (PST+SGT) at this time and requests immediate release. Movant was sentenced at a level of 26. The top

of the guidelines for level 24, the corrected level, is 63 months; *which has been served.* MOVANT WILL WAIVE PRESENCE AND COUNSEL AT RESENTENCING ON CONDITION THAT, SHOULD HIS OTHER RELIEF BE DENIED THAT HE BE ALLOWED TO SEEK A CERTIFICATE OF APPEALABILITY AND IT IS UNDERSTOOD THAT HIS OTHER ISSUES ARE NOT WAIVED, NOR ABANDONED; AND THAT IN ALL RESPECTS THE SENTENCE REMAIN THE SAME EXCEPT THE TWO POINT CORRECTION IN IMPRISONMENT; THE COURT IS NOT OBLIGATED TO ISSUE A CERTIFICATE OF APPEALABILITY (THOUGH IT SHOULD AS A MATTER OF LAW).

CONSTITUTIONAL VIOLATION III

THE UNITED STATES SUPREME COURT'S DECISION IN *STANLEY MARKS V. UNITED STATES,* 430 US 188 (1977) REQUIRES REVERSAL OF LINCOLN'S CONVICTION BECAUSE IT RESULTS FROM THE RETROACTIVE APPLICATION OF AN UNFORESEEABLE JUDICIAL ENLARGEMENT IN VIOLATION OF THE *FIFTH AMENDMENT;* BLINDING THE JURY TO THE CORRECT STANDARD OF CRIMINAL LIABILITY; AND IMPERMISSIBLY PERMITTING PREJUDICIAL RULES OF EVIDENCE AND PROCEDURE TO BE APPLIED.

Background Lincoln was convicted for alleged securities violations that occurred from late January 1989 until late September 1989. Before entering the highly risky penny-stock business (in business news daily), both Movant Lincoln and codefendant Calvin Word consulting with attorney Pyles and others who assured them that they

could not be charged for the conduct of others in a conspiracy type of criminal liability; if they entered the business which at the time was the focus of constant calls for a crackdown. Again, before hiring Mr. Hartnagle who had a past record for violations (but his level of experience was very hard to find, 26 years securities operations), counsel assured Movant and co-defendant Word that under the law they could not be linked into a conspiracy with Hartnagle, should be [sic] revert to past ways. Neither Movant, nor Word knew or understood the complexities of brokerage operations which are extremely specialized and difficult and had to rely upon hired expert help. Thus the notice of the law in early January 1989 was that Movant could not be tied-up criminally in a conspiracy should he enter the pennystocks and wind-up being targeted – he relied upon this notice of law. Counsel's advice was based upon the law of the Circuit, which limited the scope of title *18 USC§371* Conspiracy to schemes to target U.S. Agencies. *UNITED STATES V. HOPE*, 861 F.2d 1574, 1577 (11 Cir. 1988) (HOPE I) and movant relied upon that advice.

Subsequently, the criminal scope of liability under *18 USC§371* was enlarged to include, not only Agencies of the U.S. Government, but also frauds targeted at private entities. *U.S. V. FALCONE,* 939 F2d 1455 (11 Cir 1991) (en banc). The decision was made retroactive to *U.S. V. FALCONE,* 934 F 2d 1528 (11 Cir 1991). Unlike Movant, whose conduct fell totally within *HOPE* law, Falcone's conduct preceded *HOPE,* and his notice of law was broader. After the Judicial enlargement in *FALCONE,* the Government began resurrecting old cases that were not prosecutable without the advantageous rules available under Conspiracy law to pave-the-way for conviction, and foisting these prosecutions upon the Courts. See in this

regard, *UNITED STATES V. ADKINSON,* 135 F3d 1363 (11 Cir 1998) where the Eleventh Circuit chastens the Government for urging error upon the Court where the Government insisted upon ignoring *HOPE* scope of law, cajoling the court to take the risks involved, requiring reversal of the tainted convictions.

Lincoln was first taken before the U.S. Grand jury in October 1989 where he then was not targeted for Conspiracy violations (retained Counsel Michael Abbott called AUSA Gail McKenzie and was briefed that securities fraud was the violation) and no indictment was obtained with that Grand Jury. After the Judicial enlargement occurred, the Government returned to seek an indictment under the new expanded scope of *18 USC§371* and on November 22, 1993 the U.S. Grand Jury for the Northern District of Georgia returned an indictment under the enlarged scope for a violation of *18 USC§371* Conspiracy. The Conspiracy count was the "Super Count" taking up 60% of the indictment and was expressly realleged and reincorporated into Movant's other counts. (see below at Const. Violation IV, the jurisdictional ramifications of this indictment). Thus, Movant Lincoln was indicted by the retroactive application of the Judicial Enlargement in FALCONE (supra), which was totally unforeseeable by him in 1989. The United States Supreme Court has addressed this type of injustice in the following case. The case of,

STANLEY MARKS, et al. V. UNITED STATES,
450 US 188, 51 LEd 2d 260, 97 S Ct 990 (1977)

Before Hon. Justices; **POWELL, BURGER, WHITE, BLACKMUN, REHNQUIST BRENNAN, STEWART, MARSHALL AND STEVENS**

This case, unanimous in pertinent part, addressed the type of situation present in Movant's case, where a judicial enlargement is applied in a similar fashion to an ex post facto law. The decision written by Justice Powell sets out the law of these type [sic] of cases.

II [51 L Ed 2d at 268]

"[3] The Ex Post Facto Clause is a limitation upon the powers of the legislature, see Calder V Bull, 3 Dall 386, 1 L Ed 648 (1798), and does not of its own force apply to the Judicial Branch of Government. Frank V Mangum, 237 US 309, 344, 59 L Ed 969, 35 S Ct. 582 (1915). But the principle on which the clause is based – the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty. See United States V [430 US 192] Harriss, 347 US 612, 617, 98 L Ed 989, 74 S Ct. 808 (1954); Lanzetta, V New Jersey, 306 US 451, 453, 83 L Ed 888, 59 S Ct. 618 (1939).

As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In Bouie V City of Columbia, 378 US 347, 12 L Ed. 2d 894, 84 S Ct. 1697 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

"[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as art I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the ex post facto Clause form passing such a law, it must follow that a

> State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. "Id at 353-354, 12 L Ed 2d 894, 84 S Ct 1697.
>
> Similarly, in Rabe V Washington, 405 US 313, 31 L Ed 2d, 92 S Ct. 993 (1972), we reversed a conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied."

The Supreme Court reversed Mark's conviction, ordering any retrial to include defining jury instructions under the old construction. The High Court further held, ". . . . we reaffirm our [430 US 197] holding in Hamling V United States, 418 US at 102, 41 L Ed 2d 590, 94 S Ct 2887, that "any Constitutional principle enunciated in Miller which would serve to benefit petitioners must be applied in their case." (Hon. Justice BRENNAN, STEWART AND MARSHALL disagreed with a remand and went even further, stating that the violation deserved flat reversal).

If MARKS deserved to be free from this type of Due Process Violation, then LINCOLN deserves it as well. The two cases are on all fours here. The Supreme Court has ruled that a State Supreme Court cannot retroactively impose a Judicial enlargement, *BOUIE* (supra), and that a U.S. District Court cannot retroactively impose a judicial enlargement either *MARKS* (supra). The MARKS-BOUIE principle is recognized in the decisions of the Fifth and Eleventh Circuits. See *DUKE V. UNIVERSITY OF EL PASO,* 663 F 2d 522 (ft.n.4) (5 Cir 1981) (reversing Dr. Dukes case); *GUY HUNT V. TUCKER,* 93 F 3d 735 (11 Cir 1996) (ex Gov. tries to beat ethics case based on *BOUIE,* a

review of the principle given); *UNITED STATES V. HARTSELL,* 127 F 3d 343, 351 n.2 (4 Cir 1997); *ACLU OF N.J. EX REL LANDER V. SCHUNDLER,* 168 F 3d 92 (3 Cir 1999) (recognizing MARKS as enduring law). An almost on point case within the Eleventh Circuit is *UNITED STATES V. ADKINSON,* 135 F 3d 1363, 1369 (11 Cir 1998) ADKINSON I), where the zealous prosecutors cajoled the Court to make a retroactive judicial enlargement BEFORE the enlargement had occurred, the Court reversed out of prejudice to the jury, when the enlargement was delayed. The Court cited to *BOUIE* (supra) in a footnote, which tells us that they were aware of the Due Process Considerations. Movant Lincoln is on firmer ground with *MARKS* (supra) relief, because all of Lincoln's charged conduct fell under *HOPE* (supra) Law; ADKINSON AND FALCONE both had criminal conduct that occurred outside the period of *HOPE* (supra) (1989-90). With all of America to go to and with thousands of laws to chose from, the Government prosecuted Movant in the Eleventh Circuit and *UNDER ITS LAW.* That law requires Reversal of Movant's convictions.

CONSTITUTIONAL VIOLATION IV

The District Court was without Jurisdiction to proceed on the indictment against Movant, as a matter of law; a conviction based in absence of a valid indictment must be set aside.

Movant Lincoln's indictment must be based in the law that was in effect and provided notice of the law at the time of the offense conduct charged. This was the law of January to September 1989. The "Super-Count." in Movant's indictment, charging a violation of Conspiracy

title *18 USC§371* was used to form the basis for all other counts in the indictment. The "Conspiracy Super-Count" composes over half the indictment and is the basis for all other counts therein, being expressly stated in each count that the first count (Super-Count) is realleged and reincorporated in each of the other counts. Thus if the "Super-Count" is a poisonous tree, the counts where it is realleged and reincorporated are the fuits [sic] of a poisonous tree infected thereby. All of Movant's lesser counts stand in this relationship to the "Super-Count" charging an 18 USC §371 Conspiracy.

The indictment is fatally defective and without basis because it was obtained without honesty before the U.S. Grand Jury, which was lied to concerning the definition of the law that controlled the scope of proscribed conduct. The Government failed to tell the Grand Jury that in order to violate the law as to Conspiracy under *18 USC§371* in 1989 in the Northern District of Georgia THE ACCUSED MUST CONSPIRE TO TARGET AN AGENCY OF THE UNITED STATES AND NOT PRIVATE PARTIES. *UNITED STATES V. HOPE,* 861 F.2d 1574 (11 Cir 1988). The Court cannot create Jurisdiction by waiver or default. *HARRIS V. UNITED STATES,* 149 F.3d 1304, 1308 (11 Cir 1998). An indictment gained by deception upon the Grand Jury as to the law is Unconstitutional and divests the Court of Jurisdiction to go further. The Grand Jury transcripts show that the Jury was presented with allegations and testimony in an effort to show a violation of the law AFTER the law of HOPE (Id.) was Judicially enlarged in criminal scope. Thus the Grand Jury was induced to indict based upon a retroactive application of the law. This type of bending of the law to get indictments suitable to the Government was recently condemned in a similar type

of case, also involving the denial of the law of *UNITED STATES V. HOPE* (Id.) and in that case the Court wisely reversed the convictions. See *UNITED STATES V. ADKINSON,* 135 F3d 1363 (11 Cir. 1998) (indictments should follow the law, not anticipate it). Such an indictment, gained by deception upon the Grand Jury is Unconstituitoinal and no good – it cannot confer Jurisdiction upon the Court, and any proceedings following it are without validity. Like Father, Like Son; the indictment forthcoming from the first deception upon the Grand Jury, was again practiced upon the Petit Jury, where the indictment utterly failed to allege, point out or set forth the law that they would be responsible to convict by, to wit: THAT ANY GOVERNMENT AGENCY WAS EITHER A TARGET OR A VICTIM OF FRAUD. Such "blinding" of the Jurors to the law, at both the Grand and Petit levels, in violation of long held principles of law cannot confer Jurisdiction upon this Court. Even given the wide latitutude granted to questionable indictments today, the Son of the deception must fall. *UNITED STATES V. TOMENY,* 144 F3d 749 (11 Cir 1998) (insufficient indictment is a Jurisdictional defect); *UNITED STATES V. ADAMS,* 83 F 3d 1371 (11 Cir 1996). Counsel's failure to know the law and its recent history, with which his client is charged, and to protect his client from its mis-application is ineffective counsel. *UNITED STATES V. FRADY,* 456 US 152 (1982) (counsel's error infected his entire due process with error of Constitutional dimension); *HARICH V. WAINWRIGHT,* 813 F2d 1082 (11 Cir 1987) (counsel failed to correct misstatement of the law); *HOUSE V. BALKOM,* 725 F2d 608 (11 Cir 1984) (ignorance of statute ineffective); *RHODEN V. MORGAN,* 846 F.Supp. 598 (MD Tenn 1994) (failure to know changes in law held ineffective); *UNITED STATES V. HANSEL,* 70 F3d 6 (2 Cir 1995) (failure to

know law and object to indictment ineffective). An attorney's performance is not evaluated overall, but in particular key discreet portions. *HORTON V. ZANT,* 941 F2d 1449 (11 Cir 1991), this is because a single significant error by counsel can constitute ineffective assistance of counsel in violation of the Sixth Amendment. *MURRAY V. CARRIER,* 477 U.S. 478 (1986). Here, counsel was ineffective because he failed to challenge the indictment which was gained by Unconstitutional means, and permitted his client to be prosecuted under a defective indictment that conferred no Jurisdiction upon the court. Appellate counsel's failure to raise the issue, after Movant wrote her and she corresponded back on the issue, is likewise ineffective (though her belief that the issue should be brought on collateral Constitutional attack offers no refuge for her failure). Where appellate Counsel fails to raise a key meritorious issue, obvious on record, which is a controlling question of law, he is ineffective. *EVITTS V. LUCEY,* 469 US 387 (1985); *MATIRE V. WAINWRIGHT,* 811 F.2d 1430, 1438 (11 Cir 1987). While the Court would like to salvage whatever cases it can, intellectual honesty makes a strong case that this is one of the few that should not stand, meriting reversal. The Government should be ashamed of its urging such errors upon a trusting Court (although the responsible AUSA has left the Office):

> "THE ERROR IS STILL AN ERROR URGING THE ERROR UPON THE TRIAL COURT STILL VIOLATES THE UNITED STATES ATTORNEY'S OBLIGATIONS TO THE COURT AND TO THE PUBLIC." Quoting, *UNITED STATES V. EASON,* 920 F2d (11 Cir 1990)

In addition to the above prejudicial acts and omissions of Counsel in failing to defend Movant, the following partial showing is made of;

FURTHER ACTS AND OMISSIONS OF COUNSEL PREJUDICING MOVANT

1. Counsel interviewed no witnesses, nor called any, forcing Movant to have to testify. Many good witnesses were available but counsel would not research to locate them, indeed or even call Movant's ex-wife who was in the courtroom. For example, Bill Stratton of OTRA could have collaborated that Lincoln was inexperienced and followed other markets who dealt in similar or same stocks. And that it was OTRA and not Movant who determined who and when they could liquidate their stocks, yet Movant was indicted for withholding sales and liquidity. Instead of proving this Counsel, violated a direct command from Movant and stipulated to OTRA records which were "crunched" by OTRA. Also, Tony Negus should have been called. Mr. Negus was an independent Securities consultant hired by Movant and recommended by the N.A.S.D. Mr. Negus would have verified that when Movant sought liquidity for his clients OTRA was stealing the funds. Additionally accountant Hart should have been called, even without expert pay, to simply restate what he had testified to in the prior trial. Accountant Hart uncovered a scheme whereby using nominee accounts Victor Strevel and Ilene Albert bled approximately $150,000.00 of Movant's capital. When Albert was caught by the IRS trying to hide the money, she gave statements to the IRS *that counsel was given* which stated that "Will Lincoln did not know of the secret trades and profits." Counsel should

have brought in the IRS (and she said the same to the FBI basically). Movant will not recount all the witnesses here for brevity. Should the court allow it or a hearing be granted, Movant has prepared a 45 page document setting out in details the witnesses, their value to the defense and documentary evidence and its value to the defense. On the face of this counsel is wanting – as he called no witnesses at all – and tried to dissuade Movant from rebutting the perjuries, preferring no defense at all. This can never be a reasonable strategy. See *UNITED STATES V. YIZAR*, 956 F 2d 230 (11 Cir 1992) (failure to investigate witnesses ineffective); ACCORD, *HOLSOMBACK V. WHITE*, 133 F3d 1382 (11 Cir 1998) (failure to investigate and bring witness ineffective).

2. Counsel failed to know the law. This caused Movant to suffer Constitutional violations as set forth in Violations I, II, III and IV above. Beyond purely constitutional violations, counsel was responsible for knowing securities law. However, he did not know that either. This permitted unqualified witnesses who were ignorant of the securities laws to dictate false definitions of illegal conduct. For example, Counsel allowed the heightened prohibitions that were passed into law in the *1990 Pennystock Reform Act* to be retroactively imposed upon Movant by the Government, not knowing which standards were which. Witness Steve Armisted testified that the stocks traded upward in levels and that was wrong. That was ignorance. All small cap stocks trade up that way, to what are called resistance levels. "Flipping" which was a "problem" but not criminal in 1989, became a criminal act. Julie Sullivan was allowed to imply that "cold calling" is a criminal act, and counsel failed to know that "cold calling" is required for the first year of almost all new brokers in the industry and is the

backbone of the industry in starting fresh accounts at all Blue Chip houses as well as small firms. And on and on, counsel could not defend Movant because he was in water over his head. The *Georgia Bar Rules* require counsel to either consult with an expert counsel or hit the books and "bone-up." Movant's counsel did neither. The result was that the jury was left with a warped definition of criminal conduct which criminalized in their mind practices that are, or were, legal when done. The upshot was that Movant was *held criminally responsible for legal actions*. Movant has a lengthly [sic] document, with many more pertinent prejudicial acts and omissions. The first Four Constitutional Violations above were born in counsel's failure to know or *apply the law* (in fairness counsel had just assumed the case and a *double caseload* from his partner, and tried not to accept the case in every way he could). Failure to know, and or apply the law was highly prejudicial here. It allowed the conviction and sentence of Movant for conduct of which he was innocent and without notice that he was doing anything wrong. This is highly prejudicial conduct and is never reasonable strategy. *HOUSE V. BALKOM*, 725 F2d 608 (11 Cir 1984); *ACCORD, OYOLA V. BOWERS*, 947 F2d 928 (11 Cir 1991); *UNITED STATES V. STREATER*, 70 F3d 1314 (DC Cir 1995). Without a firm basis in the knowledge of the law it is not possible to put the Government to its burden and adversarially test the case against the client. Counsel failed to do that and was highly ineffective. See *UNITED STATES V. CRONIC*, 466 US 648 (1984); *CAVE V. SINGLETARY*, 971 F2d 1513 (11 Cir 1992).

3. Counsel failed to introduce into evidence many critical documents and exhibits prejudicing Movant's defense. *INDEED, COUNSEL INTRODUCED NO EVIDENCE ON*

MOVANT'S BEHALF (one exhibit which was irrelevant). The Court had provided a complete defense record at a cost of $7,000.00 which, joint defense counsel argued *was essential*. Movant's counsel failed to utilize it. Movant was charged with the type of fraud to which the main defense is "Good Faith" and "No Intent to Violate the Law." "Good Faith" is an affirmative defense to fraud. As such, it requires an effort to make the defense, which counsel refused to do. Highly important "Good Faith" exhibits THAT COUNSEL DID NOT INTRODUCE were as follows; National Association Membership Documents, and State registration documents that cost the firm about $12,000.00 yearly to stay within the law; Investor protection insurance, which again cost the firm dearly to cover the investors, documents for the above; copies of prospectuses for the securities sold showing that these were real stocks duly registered for sale to the public according to law. That none of the co-defendants were criminal with past convictions (that Movant knew of). The Government sought to prove to the Jury that the firm was Fly-by-night and induced witness Armisted to use cliches like "Boiler rooming it up" which was false, most brokers had offices or worked at private work-stations and there was nothing fly-by-night about it, yet counsel put on no evidence to show Good Faith. Movant would like to present some specific examples of how counsel permitted the Jury to be misled and did nothing about it. Witness PAT HOLMES testified about a letter wherein Movant admitted his stocks were illegal. That was a lie. The letter was available and said nothing like that. The letter stated that the firm would go to full NASDAQ in the future (and the firm spent $10,000.00 for the required level III equiptment [sic] to do so). Had counsel admitted the prospectuses to show the stock legal, and the letter to show the correct words a

devastating falsehood could have been corrected for the Jury, who was left with the testimony of a State Inspector (Ms. Holmes) that Movant sold illegal stocks. Trying to over-ride counsel, on the last day of trial on record, Movant tried in vain to admit the prospectuses, but surprized counsel blocked him with the false statement that they are all "hearsay." The Federal Registration Statement that each security must have is not "hearsay." Witness DAVID BIRCHER, a known "Cokehead" was fired by Movant for substance abuse and U-5'd with cause from Movant's firm with the N.A.S.D. (which he never contested when done). The Government put Bircher on the stand where her perjured himself non-stop in an effort to get revenge for his firing. The U-5 forms were not admitted by counsel to show Bircher's motive to lie, but were in evidence back at his office. When Bircher made a statement that anyone familiar with the securities business could impeach as a lie, Counsel was numb. Bircher claimed to have seen trade tickets on a desk (that proved fraud), however the record showed that Bircher was not even with the firm when those tickets were done and there was no fraud. Counsel likewise failed to get Bircher's police record, prejudicing Movant. Movant offered witnesses who would testify that Bircher abused cocaine at work and stayed in debt to his dealers. Counsel refused to put on any evidence to stop the impression the Jury received of Bircher (the Govt. had him cleaned-up) or impeach his lies. Counsel failed to impeach witnesses with evidence he had. At sworn S.E.C. testimony Ilene Albert and witness Hartnagle gave contradictory statements to those they gave at trial. Both of them swapped their stories around and decided to commit perjury to earn 5K1.1 (witness) reductions and escape imprisonment (neither went to prison, Movant got 6 ½ years). Witness ILENE ALBERT

was caught cheating the IRS, in the tax fraud investigation she gave a statement that is in the records counsel had where she tells the IRS that Will Lincoln knew nothing about her secret nominee accounts with Strevel. She told a similar story to the FBI, but not as distinct. Both of these reports were available but counsel did not use them to show Ilene Albert lying. The Jury never saw any of these things because counsel put forth no evidence, (at all) though the Court had paid dearly to furnish it. (counsel was oblivious to the fact *that had he known securities law*, he could have pointed out to the jury that these secret accounts robbed Movant of over $100,000.00 in capital, nearly putting the firm out of business). Witness Robert Hartnagle reversed his story that he told to the S.E.C. under Oath, after his 5k1.1 sentence reduction was promised, and lied to the jury telling them that a settlement was never reached with Charlie Watts. This is a lie. Attorney Rex Corneilson negotiated the settlement and the documents were in the records furnished by the Court, that proved it. Hartnagle went on to lie again and again, telling the jury that his daughter's wages were not paid by Movant. Counsel had cancelled checks to prove he was lying but they were never admitted (at trials' end counsel blocked the checks from being admitted telling the Court that they were "hearsay"). Counsel failed to have handwriting exemplars done which would have proved that all the financial records and operations were carried out by Hartnagle, and not as he testified, false, by Movant. (If Movant knew how to do those complex calculations then why pay Hartnagle with his 26 years experience $5000+ per month!?). Hartnagle lied to keep out of prison, his family situation is pathetic and he was easy prey to prosecutors who manipulated him to the fullest to convict an innocent man, the Movant herein. Counsel did nothing

to impeach these perjuries. Witness ALAN BRILL was a driving force behind the pressure to bring this prosecution against Movant. Brill tried to run a fraud on the public by presenting a prospectus to Movant's investors that claimed 1200 of his seats were placed with customers. Movant went to Brill's place of business to do due diligence, discovering that about 500 seats were in place (and many non-paying). Movant gave counsel a due diligence audit that was done showing the frauds. Additionally, Movant discovered that there was approximately $100,000.00 in unbooked liabilities in the prospectus. Movant requested that the untrue-exaggerated portions be corrected. Brill refused, and tried a stop-sale and reticketing of prospectuses. Movant told him that either he correct the frauds or "no dice" the firm would try a wild card first, rather than join his deceptions. Brill walked through the brokerage threatening that his lawyer, ex-SEC prosecutor Michael Cronin (who stood to gain a lot from Brill's deal) was going to get the firm prosecuted unless his deal was done and that he had stong [sic] ties with the U.S. Attorney's office – either we raise the $1.5 million or get singled out. Many witnesses can recall and testify to this stream of threats. At trial Brill took the stand to vent his invective (Movant had thrown him and his monumental fraud out the firm's door) and perjured himself. Counsel who had the audits and proof of Brill's frauds failed to raise it, or impeach Brill's motives or character, which was in his possession. Movant can expound further in detail and show that counsel committed these same neglegent [sic] errors and omissions with other key witnesses, leaving a totally false picture for the jury to deliberate on. This type of accross [sic] the board denial of adversarial testing is never objectively reasonable representation, nor acceptable strategy – and because the jury is denied the defendant's

evidence and gets a one sided story (sans adversarial testing) – is highly prejudicial. Failure to present evidence under these circumstances, to this egregious degree meets the STICKLAND (supra) threshold. *COLLIER V. TURPIN*, 177 F3d 1184 (11 Cir 1999); *HOLSOMBACK V. WHITE*, 133 F3d 1382 (11 Cir 1998); *SIMS V. LIVESAY*, 970 F2d 1575 (6 Cir 1992); *SMITH V. DUGGER*, 911 F2d 494 (11 Cir 1990); *NIXON V. NEWSOME*, 888 F2d 112 (11 Cir 1989) to simply do a perfunctory examination, present no evidence of good will, no evidence to impeach perjury when readily available and then to try in open Court on the record to try and prevent (successfully) the defendant from introducing highly valuable evidentiary exhibits himself – where Counsel put no evidence on record rised [sic] to a new low of ineffectiveness that this Court should not ignore.

4. A key error that deserves individual treatment, flows from the failure to know the law, already present above. Because it is highly prejudicial it merits attention separately. At trial, the Government pounded into the Jury *that because Lincoln had bought stocks below what the public could buy them* for, *he committed fraud*. This was not a true statement of the law as it applies to Movant's case. The securities fraud count involving Pioneer stock was legal to buy under the market, because it was bought negotiated exempt in Canada under the law. This was cleared past NASD examiner Mark Jerema. The American Pizza stock resulted from warrant conversion and was likewise exempt; because of the above facts, the two securities fraud counts in the indictment (the substantive counts) lack a legal underpinning under the law of the day in 1989 (foreign stocks are no longer exempt). Because the special pricing granted in foreign negotiated markets was

exempt from regulation, it constitutes no violation of the law nor fraud. Counsel failed to correct this misstatement of the law by the prosecutor, and to enter into the record the trade tickets that were provided by the Court to Counsel which showed the foreign acquisition of the stocks. This is highly prejudicial error, because the Jury, without the correct definition of the criminal liability, went on to convict on those counts based upon the prosecutor's statement of what constituted securities fraud. Failure to know the law and permit a false misstatement of the law affecting the client is ineffective. *HARICH V. WAINWRIGHT*, 813 F2d 1082 (11 Cir 1987); *UNITED STATES V. HANSEL*, 70 F3d 6 (2 Cir 1995) (ignorance of law ineffective).

5. Counsel failed to object to the jury charge, which failed to dilineate [sic] the definition of criminal liability for which Movant would be held accountable. The indictment "Super-Count" which comprised most of the indictment, and was expressly realleged and reincorporated into the other four counts, charged a violation of Title *18 USC§371* Conspiracy. Movant is entitled to have the jury charged according to the law as it stood at the time of the offense conduct in this Circuit. Such was not done. The jury needed to be charged that in order to commit a violation of Title *18 USC§371* Conspiracy in 1989, it must be shown that an agency of the U.S. Government was the target of the conspiracy, or the victim of it. Such a charge, which correctly reflected the scope of proscribed conduct required to convict under *18 USC§371* in 1989, was not given because counsel failed to object to the charge. This allowed a retroactive application of the judicial enlargement in FALCONE (supra) of 1991 to be applied in violation of *MARKS V. UNITED STATES* (supra) (see CONST.

VIOLATION III above). This induced an EASON type of error, *UNITED STATES V. EASON*, 920 F2d 731 (11 Cir 1990) (which requires reversal due to error in some counts, that affected all counts). Such omissions by counsel is ineffective counsel. Movant is entitled to a fully and honestly informed jury, and there is nothing objectively reasonable about denying that. *POTTS V. KEMP*, 814 F2d 1512 (11 Cir. 1987); *GRAY V. LYNN*, 6 F3d 265 (5 Cir 1993); *KUBAT V. THIERET*, 867 F2d 351 (7 Cir 1989).

Counsel's assistance failed to rise to the standard of objectively reasonable. Indeed, Due process does not mean being duly processed at any standard. Here, counsel was neglegent [sic] and highly prejudicial meeting both prongs of *STRICKLAND V. WASHINGTON*, (supra), requiring reversal because the conviction was obtained in violation of the *SIXTH AMENDMENT*. Upon careful review, the case most applicable to counsel's conduct is *UNITED STATES V. CRONIC* (supra), see also *CAVE V. SINGLETARY* (supra) (11th Cir.) where counsel failed to subject the Government's case to adversarial testing. When that happens, the innocent are convicted and unreliable results obtain – and justice is blackened.

6. Appellate counsel was ineffective in violation of the Fifth and Sixth Amendments to the U.S. Constitution. Appellate counsel failed to raise the ex post facto sentencing issue when requested, the MARKS (supra) issue as requested by Movant sent her the ADKINSON (supra) case, asking her to apply it and argue it, requested that she argue the jurisdiction. She did agree that counsel was very ineffective, and agreed that issue well (Chief Judge Hatchett of the Eleventh Circuit removed him sua sponte from the Appeal due to his behavior on appeal). Failure to raise the ex post facto sentencing issue, when asked and

then raising frivolous issues is ineffective. Failure to raise the MARKS (supra) violation is highly prejudicial. This level of ineffectiveness violated Movant's Fifth and Sixth Amendment rights to effective counsel on appeal. *EVITIS V. LUCEY*, 469 US 387 (1985); Accord, *MCBRIDE V. SHARPE*, 25 F3d 962, 973 (11 Cir 1994); *MATIRE V. WAINWRIGHT*, 811 F2d 1430, 1438 (11 Cir 1987) (failed to raise obvious issue on record).

CONCLUSION

The decision in *MARKS V. UNITED STATES* should be Binding. Movant's Fifth Amendment protections should be upheld and the conviction reversed as a matter of Constitutional law. Movant was denied the effective assistance of counsel at trial and appeal and the Court should vacate and set aside such convictions gained in violation of the Fifth and Sixth Amendments. Finally, should the Court do none of the above it should grant immediate release by correcting the 2 Pt. ex post facto, *one book rule* violation made at sentencing when counsel failed to object. MOVANT IS GRATEFUL FOR WHATEVER JUSTICE THIS COURT WILL ALLOW.

THANK YOU.

EVIDENTIARY HEARING REQUIRED

Movant has waived the need for presence at a resentencing on page 7, under *Constitutional Violation* II above. The waiver comes with a few pre-conditions. If the Court denies everything except the two point correction, then there is no need to tie-up the court with a hearing for that. Likewise, if the Court Grants relief on the record and reverses the conviction, no hearing is required. There is a

great preponderance of evidence in the record, establishing Movant's claims. *However*, should the Government enter into any factual dispute with Movant's claims for relief then an evidentiary hearing is required as a matter of law. *SMITH V. SINGLETARY*, 170 F3d 1051 (11 Cir 1999); *BALDWIN V. JOHNSON*, 152 F 3d 1304, 1312 (11 Cir 1998); *MEEKS V. SINGLETARY*, 963 F2d 316, 319 (11 Cir 1992) *Cert. Denied*, 507 US 950 (1993).

WHEREFORE MOVANT REQUESTS RELIEF AS FOLLOWS;

1. That the conviction be reversed and set-aside according to *MARKS V. UNITED STATES*, (supra), and NEW TRIAL GRANTED;
2. That Movant be ordered immediately released because he has served his sentence under his correct USSG and merits a two point reduction in sentence;
3. That the conviction be reversed and set aside due to Movant being denied his Fifth and Sixth Amendment rights to Due Process and the effective advice and assistance of counsel;
4. That the court GRANT any other and further relief pursuant to these pleadings as required by law and the interests of justice.

Verified under penalty of perjury, to the best of Movant's knowledge and recall.

RESPECTFULLY,

/s/ William F. Lincoln
WILLIAM F. LINCOLN,
MOVANT PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THE ATTACHED MOTION ON THE OFFICE OF THE UNITED STATES ATTORNEY, RUSSELL FEDERAL BLDG., 75 Spring St SW, ATLANTA, GA. 30303, BY U.S. MAIL.

Signed,

8/24/99
DATE

/s/ William F. Lincoln
WILLIAM F. LINCOLN,
MOVANT PRO SE
USN-44505019 B1
P.O. BOX – 879
COLEMAN, FL. 33521-8996

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT AT ATLANTA

WILLIAM F. LINCOLN

V.

UNITED STATES

APP. NO. 01-12760-A

MOTION FOR RECONSIDERATION

William F. Lincoln, pro se
637 Earl's Slough Ct.
Tallahassee, FL. 32312

(APPENDICES ARE OMITTED HERE)

CERTIFICATE OF INTERESTED PERSONS

Hon. Ernest Tidwell, U.S. District Judge

Bruce Kirwan, Esq.

Donald F. Samuel, Esq.

Charysse L. Alexander, A.U.S.A.

Richard Anders

Calvin Word

Thomas J Word

Janice Singer, Esq.

Paul David Sarkozi, Esq.

CERTIFICATE OF TYPE STYLE

This petition-motion is typed using prestige elite 12 pt with 10 pt presentor headings.

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18 USC§ 4241(e)

28 USC§ 2253(c)(2)

F.R.CIV.P. 40, RECONSIDERATION WITHIN 45 DAYS

THE ISSUES FOR RECONSIDERATION

COUNSEL FAILED TO OBJECT OR OPPOSE THESE DENIALS:

1. Lincoln was convicted by an improperly charged and informed jury, plain on the record before the Court. The Jury was charged with the scope of conduct that was criminalized *after* the Statute was Judicially

enlarged. This type of ex post facto-like Constitutional violation was applied to Lincoln in violation of Lincoln's Constitutional rights recognized by the U.S. SUPREME COURT in its unanimous decision in *MARKS V. UNITED STATES*, 430, US 188, 191 (1977) (prohibiting retroactive applications of judicial statutory enlagements [sic] under 5th amendment to U.S. Constitution).

The conviction of Lincoln by violation of his right to have his Jury charged with the the law as it stood at the time of the alleged offense (1989) instead of the law after 1992, is the denial of his Constitutional right of substantial showing that merits his right to appeal pursuant to *28 U.S.C.§ 2253*(e)(2).

The Courts have evidently not understood the grounds, and are asked to reconsider and permit the appeal by granting a certificate of appealability on this Constitutional point.

2. Lincoln was convicted by jury trial after being deemed incompetent to stand trial after hearing, *but without holding a competency restoration* hearing as required by Congress *18 USC§ 4241*(e). The U.S. District Court lacked Jurisdiction by Statute of the United States to take Lincoln to trial and convict him – but did so anyways. This was a violation of Lincoln's 5th Amendment Rights, and his Constitutional rights under Arts. I, II & *VI* "This Constitution, and the Laws of the United States which shall be made in Pursuance therof [sic]; . . . , shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." Lincoln was denied the Constitutional protections established by Congress and taken to trial anyways – a trial marred by over a dozen breakdowns and a brief hospitalization. The trial Court was divested of jurisdiction to try and convict Lincoln by Law. The Court is asked

to reconsider its misunderstanding of this issue, and recognize that to deny this hearing constitutes a substantial showing (on the record & docket) of the denial of a Constitutional right meriting the issuance of a Certificate of Appealability pursuant to *28 U.S.C. § 2253*(c)(2).

3. Counsel, pretrial, at trial and on appeal failed to object and oppose these Constitutional Violations of Lincoln's Rights and Protections. There is no way a jury could have convicted Lincoln of the overarching conspiracy charges if properly charged, because the U.S. Government or its agencies were not targets of the alleged scheme (as required for a conviction in 1989 when the conduct occurred) and not a shred of evidence was presented to show that the United States or its Agencies were defrauded of anything. Lincoln was innocent and convicted by way of misinforming the Jury as to the law that Lincoln was entitled to, violating Lincoln's rights. Counsel, pretrial, at trial and on appeal failed to object and oppose the Trial Court's failure to hold a competency restoration hearing as required by law to proceed to trial with incompetents. The above failures by Counsel allowed a busy Court to overlook, or give due notice to these prejudicial violations of Lincoln's Constitutional rights. Had Counsel objected to these denials, there is no way that the Trial Court would not have acted to secure Lincoln's Rights and hold a fair trial under the U.S. Constitution. Counsel's failure was highly prejudicial, violating Lincoln's Sixth and Fifth Amendment Rights under the U.S. Constitution. The above Constitutional violations, plain on the record, make a substantial showing of the denial of three Constitutional rights and merits the issuance of Certificates of Appealability for each pursuant to *28 USC§ 2253*(c)(2) upon reconsideration.

MOVANT-PETITIONER, HEREBY REQUESTS RECONSIDERATION AND RELIEF.

SINCERELY,

/s/ William F. Lincoln
WILLIAM F. LINCOLN,
PRO SE

CERTIFICATE OF SERVICE

I hereby certify that I have sent a true copy of the attached legal document to the Office of the UNITED STATES ATTORNEY, Attn: Charysse L. Alexander, AUSA, 1800 US Courthouse, 75 Spring St., SW Atlanta, Ga. 30335 by Firstclass U.S. mail or delivered by hand.

2/2/02
Date

/s/ William F. Lincoln
WILLIAM F. LINCOLN
PRO SE
637 EARL'S SLOUGH CT.
TALLAHASSEE, FL. 32312

UNITED STATE [sic] DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

WILLIAM F. LINCOLN,
Movant,

v.

UNITED STATE [sic]
OF AMERICA,
Respondent.

HABEAS ACTION
NO. 1:99-CV-2245-GET

UNDERLYING
CRIM-ACTION
NO. 1:93-CR-506-GET

MOTION FOR RECONSIDERATION AND CORRECTION OF JUDGEMENT ON DENIAL OF CERTIFICATE OF APPEALABILITY; F.R.CIV.P. 59

(Filed Sep. 10, 2001)

THE GROUNDS FOR CERTIFICATE OF APPEALABILITY WERE MISCONSTRUED AND IGNORED BY THE GOVERNMENT AND THIS HONORABLE SHOULD RULE ON THEIR MERITS

Comes now Movant, William F. Lincoln, in his own proper person and moves this Honorable Court to Reconsider is denial of Movant's request for Certificates of Appealability entered on August 29, 2001 and thereafter to rule on the grounds advanced by Movant entered on May 15, 2001 correcting or amending judgment pursuant to *F.R.Civ.P. 59*; in support of which Movant shows as follows:

1. The Court has based its ruling upon the government's response of August 17, 2001 which ignored Movant's main grounds, misconstrued Movant's grounds and baldly misrepresented the holdings of Federal Caselaw; including that of the U.S. Supreme Court. See

attached *Exhibit A Movant's Notice of Appeal and Combined Application for Certificates of Appealability.* See attached *Exhibit B*, Order adopting Government's Response and Denying Certificates of Appealability.

2. The Government replied to only two claims – and ignored the others. Movant cited *ineffective assistance of counsel overarching four claims* in his request for Certificates of Appealability, as follows:

INEFFECTIVE ASSISTANCE OF COUNSEL, where counsel failed to object to:

A) That the U.S. Supreme Court's holdings in *Stanley Marks v. United Sates [sic]*, 430 U.S. 188 (1977) (proscribing retroactive application of Judicial enlargements of Criminal Code) were violated when Lincoln was subjected to a retroactive change in the law which violated a key Constitutional right of the *Fifth Amendment* as held in *Marks*, id. See *Exhibit C Motion for Reconsideration of March 9, 2001.*

In the *Government's Response*, page 3, the government argues that the Judicial Enlargement did not apply to defendant because:

> "Controlling case law at the time defendant's case proceeded to trial did not require the government to prove that the United States was a victim of the conspiracy."

U.S. v. Falcone, 960 F. 2d 988, 989 (11th Cir. 1992).

In this statement, the Government totally fails to address the issue at hand. The law at the time of the trial is not the issue here. *It is the law at the time of the offense conduct that should have been charged to the*

jury. Instead the jury was charged with the law as it stood in 1995, five years after the alleged offense conduct and three years after the enlargement of the statute accured [sic] *Falcone* id. is totally void of help for the Government and indeed proves the date of statutory enlargement of criminal scope. The Court relied upon this error of law by the Government and should reconsider its judgment.

B) ***Unconstitutional Jury Charge***. As a key part of the above ground, but a *district separate violation* in itself, Movant Lincoln was denied a constitutional jury charge, in that the Jury was not charged according to the law as it stood at the time of the charged offense conduct, but was charged with the scope of criminal conduct *after the law was enlarged to include Movants alleged conduct*. This violated Movant's constitutional right to a fully informed and properly charged jury.

C) ***Competency Restoration Hearing Denied***. In a trial marred by over 25 disruptions and breakdowns by Movant, the unconstitutional denial of the statutory mandated competency restoration hearing, required by *18 USC § 4241(e)* becomes apparent. *Movant was not competent.* This hearing cannot be waived. The Government's attempt to misconstrue *Pate v. Robinson*, 383 U.S. 375 (1966) to justify nullification of statute law is a bald misapplication and misstatement of the U.S. Supreme Court's holding in *Pate*. The trial Court, in the absence of the hearing required by *18 USC § 4241(e)* violated Movant's Constitutional rights and was ***without Jurisdiction to proceed to trial*** with Movant Lincoln.

D) ***Ineffective Assistance of Counsel***. Counsel's failure to object to the above violations led to the

Conviction of an innocent man. Additionally, Counsel failed to impeach blatant perjury repeatedly, despite his ready possession of hard evidence impeaching key perjury. Counsel entered only one exhibit for the defense, despite his possession of hundreds of exhibits that impeached and disproved the Governments case in Chief. (Indeed, this very court granted early release to Movant due to counsel's ineffectiveness at sentencing.) This ineffective assistance of Counsel violated Movant's *Fifth Amendment* and *Sixth Amendment* rights under the *U.S. Constitution* as held by the *Eleventh Circuit Court of Appeals* and the *U.S. Supreme Court*.

3. Finally, the court never issued a written opinion stating that Movant's claims were procedurally barred; the evidence was to a significant suborned and *false*; the trial was without the jurisdiction and unconstitutional.

Wherefore, Movant requests this Honorable Court grant *Certificates of Appealability* as to *Ineffective assistance of counsel*; where Counsel *failed to object* to the retroactive application of a prejudicial statutory enlargement, where counsel *failed to object* to the jury charge and where counsel *failed to object* to the absence of a required competency restoration hearing for his client.

Movant ever prays for relief.

Respectfully submitted,

/s/ William F. Lincoln
William F. Lincoln,
Pro Se Movant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served to the Office of the United States Attorney, Attn: Charysse L. Alexander, AUSA, 1800 US Courthouse, 75 Spring Street, SW Atlanta, Georgia on this 7 day of September, 2001, by U.S. mail.

/s/ William F. Lincoln
William F. Lincoln
Pro Se
637 Earl's Slough Ct.
Tallahassee, Florida 32312

APPENDIX H

OUTTAKES FROM PAGES 20, 21 OF GOVERNMENT'S RESPONSE TO MOTION TO VACATE – SHOWING FLAWED UNDERSTANDING OF "RETROACTIVE" OCT. 1999

* * *

case because *Falcone II* had not yet been decided. *Id.* at 1372. The *Adkinson* panel determined that the defendants had suffered undue prejudice because they were forced to defend themselves against offenses which were not offenses under the prevailing law. *Id.* at 1373. The defendant claims that *Adkinson* applies because there was a gap in the "notice of law", since the offense charged in his indictment took place during the period of January 1989 to November 1989, while the law in this circuit was unsettled.

Contrary to the defendant's claims, there was no gap in the notice of law. The defendant was indicted in November 1993 and found guilty by a jury, long after *Falcone II* had overruled *Hope I* and *Hope II* and the law was firmly settled. The defendant has failed to demonstrate that a judicial enlargement occurred regarding his 1989 offense, thus is unable to show prejudice and this Court should deem this issue procedurally barred.

B. Fatally Defective Indictment

The defendant also claims that the indictment was fatally defective because it failed to name the United States as an object of the conspiracy under *Hope*. As previously demonstrated, there was no judicial enlargement in this case. At the time of the defendant's trial, the

law was settled and the government was not required to demonstrate that the United States was a victim of the conspiracy. Nonetheless, the defendant's claim on this issue is not cognizable in a § 2255 motion.

Challenges to the indictment must be made prior to trial. Fed.R.Crim.P. 12(b)(2); *Davis v. United States*, 411 U.S. 233, 238 (1973) (waiver provisions of Rule 12(b)(2), Fed.R.Crim.P., applicable to post-conviction relief proceeding pursuant to 28 U.S.C. § 2255); *United States v. Jennings*, 991 F.2d 725, 729-30 (11th Cir. 1993). *United States v. Trujillo*, 714 F.2d 102, 105 n.1 (11th Cir. 1983). The defendant failed to establish just cause for his failure to raise the challenge prior to trial, therefore, it has been waived. Once the guilty verdict is returned, the defendant's only available remedy is to challenge the sufficiency of the evidence before the district court and on direct appeal. Here, the Eleventh Circuit affirmed the defendant's securities fraud and conspiracy convictions, concluding that the evidence was more than sufficient. Thus, the defendant's claim on this issue should be denied.

C. Jury Instruction

Lastly, the defendant claims that the trial court should have instructed the jury that it must prove that the government was a target of the conspiracy, or the victim under *Hope*. For all the reasons previously stated, this claim is also without merit and this issue should be denied.

* * *

APPENDIX I

OUTTAKE FROM GOVERNMENT RESPONSE FILED FEB 11, 2000

* * *

1. Defendant Lincoln Verbally Waived his Right to Competency Restoration Hearing

The government acknowledges that the record reflects the court did not conduct a restoration to competency hearing. However, the record also reflects that the defendant was found competent following an extensive psychiatric evaluation conducted at FCI Butner, *see* Butner Report 10-12; the record further reveals that even though the defendant Lincoln requested a competency hearing following his release from custody at Butner, the defendant later verbally withdrew that request. Defendant Lincoln, therefore, waived his right to challenge the court's failure to conduct a competency restoration hearing. (*See* Exhibit 1, Affidavit of Bruce Kirwan). The defendant vigorously maintained that he was competent to stand trial as defined in 18 U.S.C. § 4241. (*See* Affidavit or [sic] Bruce Kirwan; R3-243, "Notice of [sic] to Act as Co-counsel . . . by defendant Lincoln, and R14-2-3). The defendant is unable to show the trial court's failure to conduct a restoration hearing constituted a manifest miscarriage of justice. The defendant has failed, therefore, to demonstrate the requisite prejudice entitling to him review of this claim.

Notwithstanding defendant Lincoln's waiver, he is unable to demonstrate that he was incompetent to stand trial. Due process requires that a defendant not be made to stand trial for a criminal charge unless he is mentally competent. *Dusky v. United States*, 362 U.S. 402 (1960)

(per curiam). The test for competency to stand trial is whether the defendant "has sufficient present ability to

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WILLIAM F. LINCOLN, Petitioner,	:	CRIMINAL NO. 1:93-CR-506-01
V.	:	
UNITED STATES OF AMERICA, Respondent.	:	CIVIL NO. 1:98-CV03036-GET

GOVERNMENT'S ENUMERATION OF PENDING ISSUES

(Filed Oct. 2, 2000)

Comes now the United States of America, by and through its counsel, Richard H. Deane, Jr., United States Attorney, and Charysse L. Alexander, Assistant United States Attorney for the Northern District of Georgia, and enumerates the issues raised by Defendant William F. Lincoln which remain to be decided by the Court.

On August 31, 1999, Defendant Lincoln filed a motion to vacate his sentence (docket number 357). In that motion, Defendant Lincoln raised a number of claims which the United States interpreted as follows:

(1) that his trial counsel provided ineffective assistance by

(a) failing to investigate the securities defense law;

(b) failing to present a "good faith" defense;

(c) failing to call witnesses and present exhibits; and

(d) failing to object at sentencing to the application of a two-level adjustment under U.S.S.G. § 3B1.3 for abuse of trust, in coordination with a four-level adjustment under U.S.S.G. § 3B1.1 for his organizer/leadership role in the offense;

(2) that defendant Lincoln's securities conspiracy and fraud convictions were obtained by an impermissible judicial enlargement because the indictment improperly failed to name the United States as a victim under *United States v. Hope*, 861 F.2d 1574, 1577 (11th Cir. 1988) (dismissing indictment where it improperly failed to allege that the United States was a victim) and *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) (reversing trespassing conviction holding that conviction rested on an unexpected construction of the state trespass statute);

(3) that the indictment was fatally defective because it failed to name the United States as an object of the conspiracy under *Hope*; and

(4) that the trial court should have instructed the jury that it must prove that the government was a target of the conspiracy, or the victim under *Hope*.

This Court ruled on the issue summarized above in (1)(d) on October 19, 1999, but did not address any of the other issues. Therefore, issues (1)(a)-(c), (2), (3), and (4) remain to be ruled upon by this Court.

In defendant's supplemental motion to vacate sentence filed on October 4, 1999, defendant raised additional claims which the United States interpreted as follows:

> (1) that this Court lacked jurisdiction to hold a trial of defendant Lincoln because it failed to conduct a restoration to competency hearing under 18 U.S.C. § 4241(e); and
>
> (2) that the Court lacked jurisdiction to sentence the defendant to 78 months imprisonment because the statute under which defendant was convicted provided a maximum statutory penalty of 60 months.

This Court has not yet ruled on either of these two additional issues.

Respectfully submitted this 2nd day of October, 2000,

RICHARD H. DEANE, JR.
UNITED STATES
ATTORNEY

/s/ Charysse L. Alexander
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